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IN THE

Supreme Court of the United States

AMERICAN CHEMISTRY COUNCIL, AMERICAN FOREST AND PAPER ASSOCIATION INC., AMERICAN PETROLEUM INSTITUTE, NATIONAL PETROCHEMICAL & REFINERS ASSOCIATION,

Petitioners,

v.

SIERRA CLUB, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Clean Air Act, 42 U.S.C. § 7607(b)(1), provides a 60-day period for initiating petitions for review of Environmental Protection Agency (EPA) regulations. Petitions for review filed outside that period are jurisdictionally barred. The District of Columbia Circuit has adopted a "constructive reopening" doctrine that permits a challenge to longstanding regulations regardless of a failure to challenge the regulation within the statutorily authorized period, whenever regulatory changes have "changed the calculus for petitioners in seeking judicial review." Pet. App. 12a. Other courts of appeals have permitted petitions for review in such circumstances only after the petitioner has first filed a petition with the agency to alter or rescind its regulation. The question presented is:

Whether a petitioner may challenge a Clean Air Act regulation after the Act's 60-day time period for judicial review has expired, on the ground that the regulatory context of the regulation has changed sufficiently to alter the stakes for judicial review, without first filing a petition with the EPA to rescind or alter the regulation.

PARTIES TO THE PROCEEDING

The Petitioner in Nos. 02-1135 and 03-1219 below was Sierra Club.

The Petitioners in No. 06-1215 below were Friends of Hudson, Environmental Integrity Project, Louisiana Environmental Action Network and Coalition for a Safe Environment.

The Petitioner in No. 07-1201 below was Coalition for a Safe Environment.

The Respondents in these consolidated cases below were the United States Environmental Protection Agency and Stephen L. Johnson, Administrator.

The Intervenors in these consolidated cases below were American Chemistry Council, National Environmental Development Association's Clean Air Project, Alliance of Automobile Manufacturers, National Paint and Coatings Association, Coalition for Clean Air Implementation, Clean Air Implementation Project, Air Permitting Forum, American Forest and Paper Association, American Petroleum Institute and National Petrochemical & Refiners Association, all in support of Respondent EPA.

RULE 29.6 STATEMENT

Petitioner American Forest & Paper Association ("AF&PA") is the national trade association of the forest, paper and wood products industry.

Petitioner American Petroleum Institute ("API") is a nationwide, not-for-profit association.

National Petrochemical & Refiners Association ("NPRA") is a national trade association.

The AF&PA, API, and NPRA have no parent companies, and no publicly-held company has a 10% or greater ownership interest in either the AF&PA, API, or NPRA.

The American Chemistry Council ("ACC") is a not-for-profit trade association. ACC has no outstanding shares or debt securities in the hands of the public and has no parent company. No publicly held company has a ten percent (10%) or greater ownership interest in ACC.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners American Chemistry Council, American Forest and Paper Association Inc., American Petroleum Institute, and National Petrochemical & Refiners Association respectfully petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 551 F.3d 1019 and is reproduced in the appendix to this petition (Pet. App.) at 1a–21a. The orders of the court denying the petitions for rehearing and rehearing en banc are unreported, and are reprinted at Pet. App. 22a–25a.

JURISDICTION

The judgment of the court of appeals was entered on December 19, 2008. A timely petition for rehearing was denied on July 30, 2009. Pet. App. 22a–23a. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254.

STATUTES AND REGULATIONS INVOLVED

Section 112, 42 U.S.C. § 7412, section 302, 42 U.S.C. § 7602, and section 307, 42 U.S.C. § 7607, of the Clean Air Act, and 40 C.F.R. § 63.6, in relevant parts, are reproduced in the appendix at 26a–35a.

STATEMENT

In this case, a divided panel of the D.C. Circuit invalidated a 1994 air pollution rule at the Sierra Club's request, even though the Clean Air Act's 60–day window for seeking judicial review of the rule

had long since passed. The court reasoned that, notwithstanding the text of the Clean Air Act, Sierra Club should be allowed to challenge the 1994 rule because later rulemakings had changed the context in which the earlier adopted rule operates, which has supposedly altered the "stakes of judicial review." The panel held that the rule had been "constructively reopened," while conceding that it had not been "actually reopened."

The holding below raises a square conflict among the circuits: the consensus of the Fifth, Eighth, Ninth, and Eleventh Circuits is that, in these circumstances, Sierra Club should have first presented its case to the agency, petitioning the Environmental Protection Agency (EPA) to rescind its rule. If EPA had denied its petition to rescind, all circuits agree that the Sierra Club could have challenged this denial and the agency's reasoning in federal court. This petition-to-rescind procedure would have caused Sierra Club no harm and would have avoided several harms caused by the D.C. Circuit's ruling.

First, the D.C. Circuit's ruling defies the plain text of the Clean Air Act (CAA). Under CAA section 307(b)(1), Sierra Club had 60 days within which to file its petition for review, 42 U.S.C. § 7607(b)(1); here, it waited eight years.

Second, the decision below unravels the normal procedure for administrative rulemaking. In the normal rulemaking process the agency notifies the public of a proposed rule change; the stakeholders comment on the proposal; the agency compiles these comments in a record; and finally the agency makes a considered decision on the basis of that record. At that point, the decision is subject to judicial review for a specified period of time. The "constructive

reopening" doctrine, which allows a party to challenge a longstanding regulation in court anytime that the context of the regulation changes, bypasses and undercuts this process. It allows a petitioner to raise a new challenge in court, without notice to other stakeholders or comments from them, without a record, without agency consideration of the views of all interested parties, and without a reasoned agency decision made in a nonlitigation context.

Third, the D.C. Circuit severely compounded this problem in its substantive ruling by invalidating the 1994 rule on the basis that EPA had supposedly admitted that it did not comply with statutory requirements. Regardless of whether EPA actually admitted anything, an agency cannot "admit" the meaning of a statute. Allowing an agency to admit to the meaning of a statute means that an agency can reverse a longstanding rule in its litigation papers. In this case, the court held that a few sentences in a legal brief in 2008 negated a rule promulgated 14 years earlier after careful deliberation through notice-and-comment procedures. If the agency wishes to reverse position, it should do so following regular rulemaking procedures open to all stakeholders.

Fourth, invalidating this particular rule threatens regulated industries and businesses with substantial liability, and the economy with unnecessary disruption. The 1994 rule had provided that during startup, shutdown, and malfunction (SSM) events, businesses had to follow good work practices for minimizing emissions, rather than meeting the otherwise applicable standards for emissions of hazardous air pollutants developed for normal operations. EPA promulgated this rule because it recognized that startup, shutdown, and malfunction periods present unique and disparate challenges.

Acknowledging that these idiosyncrasies often make it impossible for businesses to meet the otherwise applicable emission standard, or for EPA to prescribe a different standard for such events, EPA directed that all sources follow "good air pollution control practices for minimizing emissions," during startup, shutdown, and malfunction events. 40 C.F.R. § 63.6(e)(1)(i). The ruling below means businesses will be liable for noncompliance with standards that EPA has acknowledged they will be unable to meet during certain SSM periods. This is a significant threat to these businesses because both the government and ordinary citizens may sue them under the Clean Air Act, potentially subjecting violating businesses to substantial civil, and even criminal, penalties.

In sum, this case presents an issue of sweeping importance both to administrative law and to companies subject to the Clean Air Act—an issue on which the circuits are squarely divided. The Court should grant certiorari.

A. Statutory Background

The Clean Air Act, designed to "protect and enhance the quality of the Nation's air resources," 42 U.S.C. § 7401(b)(1), assumed its modern shape after significant amendments in 1970. It contains several programs to achieve its ends. Among the principal provisions are the Clean Air Act section 111 "standards of performance" for certain categories of new sources that "cause[], or contribute[] significantly to, air pollution" that endangers the public. 42 U.S.C. § 7411(b)(1). These section 111 standards are known as new source performance standards, or NSPS. When EPA first issued NSPS standards in the 1970s, it directed that they did not apply to periods of equipment startup, shutdown, and malfunction

(SSM), because the technologies used to meet these standards of performance often "do not reach optimum operating efficiency for some time," and because there is a "statistical probability of infrequent, unavoidable mechanical failures" that can make it impossible for a source to meet the standards during a period of malfunction. 37 Fed. Reg. 17,214 (proposed Aug. 25, 1972). Instead, sources must follow "good air pollution control practice for minimizing emissions" during SSM periods—a standard that better reflects the unique and unpredictable problems faced by extremely diverse sources during these events. 40 C.F.R. § 60.11(d).

The Clean Air Act also regulates hazardous air pollutants under section 112. 42 U.S.C. § 7412. In 1990 Congress significantly altered the hazardous air pollutant provisions of the Clean Air Act. Congress listed 189 hazardous air pollutants, *id.* § 7412(b), and directed that EPA provide "a list of all categories and subcategories" of stationary sources that emitted these pollutants by November 15, 1991. *Id.* § 7412(c). Congress also instructed EPA to promulgate emission standards for each source category on an aggressive schedule. *Id.* § 7412(d), (e). These section 112 standards are known as maximum achievable control technology, or MACT, standards. MACT standards for new sources must be at least as stringent as "the emission control that is achieved in practice by the best controlled similar source." *Id.* § 7412(d)(3). EPA has set MACT standards on a source-by-source basis for well over one hundred source categories, 40 C.F.R. pt. 63, ranging from "Wood Furniture Manufacturing Operations," 40 C.F.R. pt. 63, subpt. JJ, to "Containers" 40 C.F.R. pt. 63, subpt. PP, and from "Dry Cleaning Facilities," 40 C.F.R. pt. 63, subpt. M, to "Shipbuilding and Ship Repair," 40 C.F.R. pt. 63,

subpt. II. Thus, these section 112 standards now affect a vast array of American manufacturers.

In promulgating MACT standards during the early 1990s, EPA relied upon its experience from the NSPS program. It noted that section 112's technology-based standards for hazardous air pollutants are "essentially equivalent to [section 111] performance standards," which apply to non-hazardous air pollutants. 58 Fed. Reg. 42,760, 42,762 (proposed Aug. 11, 1993). Consequently, it adopted a similar exemption and general duty for startup, shutdown, and malfunction events. EPA stated, with no equivocation, that "it is technically impossible to properly operate" some required pollution control techniques during "unpredicted and reasonably unavoidable failures of air pollution control systems." *Id.* at 42,777. Accordingly, it required sources to comply with the general duty to follow "good air pollution control practices for minimizing emissions to the greatest extent possible consistent with safety and good air pollution control practices," during such events, 40 C.F.R. § 63.6(e)(1)(i), rather than the otherwise applicable MACT standard. National Emission Standards for Hazardous Air Pollutants for Source Categories: General Provisions, 59 Fed. Reg. 12,408 (Mar. 16, 1994) ("1994 Rule").

Another provision of the 1994 Rule established "recordkeeping requirements to allow [sources] to develop a plan" for SSM events. 58 Fed. Reg. at 42,777. The 1994 Rule also provided that this plan would be incorporated into the operating permit required by the Clean Air Act, Title V. See 42 U.S.C. § 7661 *et seq.*; 59 Fed. Reg. at 12,439.

EPA's final rule was published on March 16, 1994. Clean Air Act section 307(b) directs that section 112 rules may be challenged only by a petition for review

in the D.C. Circuit within 60 days of publication—in this case the deadline for challenge was May 15, 1994. 42 U.S.C. § 7607(b)(1). Environmental groups did not petition for review of the 1994 Rule. Although industry groups did seek review of other portions of this rule,[1] no one challenged the SSM provision at issue here—that is, the requirement that a source follow the general duty to minimize emissions during SSM periods unless its MACT prescribes a more specific SSM standard. Accordingly, all stakeholders—EPA, industry, States, environmental groups, and others, viewed the SSM issue under section 112 as resolved, subject only to future agency promulgations, after notice and opportunity to comment, of new MACT emission standards for individual source categories.

After 1994, EPA promulgated MACT standards for numerous source categories. Because these standards are specific to individual types of industrial operation, they may supersede the general provisions of the 1994 Rule where applicable. Some of these MACT standards for specific industrial operations apply during SSM periods, superseding the general duty to follow good practices for minimizing emissions during such periods. See 40 C.F.R. pt. 63, subpt. L, National Emission Standards for Coke Oven Batteries; 40 C.F.R. § 63.310. This makes sense for source categories where startup, shutdown, and malfunction events create predictable emission problems that may be planned for and addressed with new technology.

Many of the MACT standards, however, do not apply during SSM events; instead, they rely on the

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[1] Industry groups' claims were largely rejected. *Nat'l Mining Ass'n* v. *U.S. EPA*, 59 F.3d 1351 (D.C. Cir. 1995) (per curiam).

general duty established in the 1994 rule to follow good air pollution control work practices for minimizing emissions at such times. This is not surprising because during startup, shutdown or malfunction, it is often literally impossible for sources to comply with the otherwise applicable MACT standards for normal operations.

For example, when, after the decision below, EPA proposed MACT standards for stationary reciprocating internal combustion engines, EPA recognized that "emissions will likely be different during periods of startup and malfunction, particularly for engines relying on catalytic controls." 74 Fed. Reg. 9698, 9710 (proposed Mar. 5, 2009). The agency determined that for some stationary internal combustion engines, it could not rely upon catalytic controls to reduce emissions during startup "because the engine exhaust temperatures need to increase up to a certain level for such controls to work effectively." *Id.* Further, EPA found that for this category of sources, add-on controls often cannot be relied upon during periods of malfunction, and relying upon the catalytic controls during this period could permanently damage the controls, rendering them unusable during normal conditions. *Id.*

Faced with the decision below, EPA could no longer rely on the general duty, and instead proposed different, less stringent standards for periods of startup, shutdown, and malfunction. *Id.* at 9702–03 (listing different proposed standards for non-emergency 2SLB, 4SLB, 4SRB, and CI sources). But *existing* MACT standards often rely on the same kinds of catalytic controls—controls that EPA has acknowledged cannot be applied during startup and malfunction. Thus, EPA was only stating the obvious years ago when it noted that "unpredicted and

reasonably unavoidable failures of air pollution control systems" could occur, making it "technically impossible" to comply with MACT standards designed for normal operation. 58 Fed. Reg. at 42,777. Indeed, applying MACT standards designed for normal operations to SSM events would violate the plain text of the CAA, which requires that such standards be "achievable." 42 U.S.C. § 7412(d)(2).

B. Proceedings Below

In 2002, 2003, and 2006 EPA promulgated new rules that changed how EPA *monitors* a source's compliance with the general duty to minimize emissions during SSM events.[2] As noted, other provisions of the 1994 Rule required sources to file SSM plans. Under these provisions, compliance with the plan provided a safe harbor from enforcement actions for violating the general duty. The 2002, 2003, and 2006 rulemakings altered these provisions so that plan requirements no longer needed to be subject to Title V review, but also provided that a source's compliance with a plan no longer provided it with a safe harbor.

Sierra Club filed petitions for review, challenging the 2002, 2003, and 2006 rules, alleging that these

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[2] National Emission Standards for Hazardous Air Pollutants for Source Categories: General Provisions; and Requirements for Control Technology Determinations for Major Sources in Accordance with Clean Air Act Sections, Sections 112(g) and 112(j), 67 Fed. Reg. 16,582 (Apr. 5, 2002); National Emission Standards for Hazardous Air Pollutants for Source Categories: General Provisions; and Requirements for Control Technology Determinations for Major Sources in Accordance with Clean Air Act Sections, Sections 112(g) and 112(j), 68 Fed. Reg. 32,586, 32,591 (May 30, 2003); National Emission Standards for Hazardous Air Pollutants: General Provisions, 71 Fed. Reg. 20,446 (Apr. 20, 2006).

rules did not ensure compliance with the general duty. But Sierra Club also argued that the 1994 rule itself was invalid because it relied on the general duty to minimize emissions during SSM periods, rather than the otherwise applicable MACT standard. Sierra Club argued that the 1994 Rule violates section 112's requirement that EPA promulgate "emission standards" because CAA § 302(k) defines "emission standard" as a requirement that "limits the quantity, rate, or concentration of emissions of air pollutants on a *continuous* basis." 42 U.S.C. § 7602(k) (emphasis added). According to Sierra Club, the 1994 rule did not provide for emission limits on a "continuous" basis.

EPA, joined by Petitioners, noted that the court only had jurisdiction to review petitions that had been timely filed, and that the period for reviewing the 1994 Rule had long passed. The D.C. Circuit acknowledged that the petition fell outside the statutory period, and that EPA had neither reopened the 1994 Rule, nor acted in a manner that was "tantamount to an *actual* reopening" of the rule. Pet. App. 8a–9a (emphasis in original). Nevertheless, the court held that EPA had "constructively reopened" its 1994 Rule by "modifying the SSM plan requirements." *Id.* at 10a. The court asserted that changing the SSM plan requirements had "'*completely* changed the regulatory context for its SSM exemption.'" *Id.* (quoting Sierra Club brief) (emphasis in original).

Offering several extended quotations from Sierra Club's brief, and none from the Clean Air Act, the court asserted that "'EPA ha[d] eliminated all of the[] safeguards,'" that had ensured compliance with the general duty. Pet. App. 10a (quoting Sierra Club brief). The court suggested that "'the general duty requirement and the SSM plan requirements were

both elements of a package deal that EPA devised and sold to the public as adequate protection from [hazardous air pollutants] during SSM events.'" *Id.* at 12a (quoting Sierra Club brief). Thus, the court concluded that the 2002, 2003, and 2006 rules had "changed the calculus for petitioners in seeking judicial review, and thereby constructively reopened consideration of the exemption from section 112 emission standards during SSM events." *Id.* at 12a–13a (internal citation omitted).

The court next concluded that the 1994 Rule violated CAA section 112. It reasoned that the definition of "emission standard" in CAA section 302(k) meant that "there must be continuous section 112–compliant standards." Pet. App. 15a. It asserted that EPA had admitted that the general duty to follow good practices to minimize emissions was "not a section 112–compliant standard." *Id.* Thus, it invalidated the 1994 Rule, asserting that "the general duty that applies during SSM events is inconsistent with the plain text of section 112." *Id.* at 2a. Consequently, the court did not reach Sierra Club's objections to the 2002, 2003, and 2006 rules. *Id.* at 17a.

Judge Randolph dissented from the panel decision. On the constructive reopening doctrine, he noted that "[t]he majority's [constructive reopening] rationale implies that each time EPA changes an emissions regulation, it risks subjecting every related regulation to challenges from third parties." Pet. App. 19a. He also noted that there is no need for the constructive reopening doctrine: Sierra Club "may file a petition to rescind [the 1994] regulations, and if EPA denies the petition, Sierra Club may seek judicial review of EPA's action." *Id.* at 20a. Judge Randolph also dissented from the majority's

substantive ruling, noting that the majority's substantive analysis "dispose[d] of the case with an argument not addressed in the brief of either party," so "EPA never had a fair opportunity to address the issue." *Id.* at 20a–21a. A timely petition for en banc rehearing was denied on a five-to-three vote, with Senior Judge Randolph and Judge Kavanaugh not participating.

REASONS FOR GRANTING THE PETITION

The D.C. Circuit's "constructive reopening" device violates the plain text of the Clean Air Act, expanding the jurisdiction of the court of appeals beyond that granted by Congress. The decision also conflicts with the decisions of several other federal circuits. The court's disregard of the text of the Act conflicts with a long line of decisions from this Court. The decision below presents particularly important questions because the "constructive reopening" doctrine threatens to undo administrative finality in cases far beyond those involving EPA, thereby shifting the focus of agency rulemaking from notice and comment procedures, where the agency, industry, other organizations, and the public can present their views and defend their interests, to the federal courts, where litigants are incentivized to play a cat-and-mouse game with the agency and other parties in order to attack settled rules.

The need for review of the decision of the D.C. Circuit is particularly acute because of its substantive conclusion that the general duty to follow "safety and good air pollution control practices for minimizing emissions," during periods of equipment startup, shutdown, and malfunction, unambiguously violates EPA's duty to promulgate "emission standards." This aspect of the decision holds sources

experiencing unavoidable malfunctions liable for failure to comply with MACT rules that were adopted on the understanding that it would often be impossible to comply with them during malfunctions. Given that the CAA authorizes both governmental and citizen suit enforcement of the Act, the decision threatens industries with substantial, unavoidable, and unnecessary liabilities.

I. THE DECISION BELOW DEFIES THE PLAIN TEXT OF THE CLEAN AIR ACT AND UNRAVELS IMPORTANT ADMINISTRATIVE PROCEDURES.

The Clean Air Act's judicial review provision, CAA section 307(b)(1) provides: "A petition for review of action of the Administrator in promulgating . . . any emission standard or requirement under section 7412 of this title . . . may be filed only in the United States Court of Appeals for the District of Columbia." 42 U.S.C. § 7607(b)(1).[3] It further provides:

> Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise.

Id.; see also *Envtl. Def.* v. *Duke Energy Corp.*, 549 U.S. 561, 572–73 (2007).

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[3] This provision dictates the review procedures for eight categories of EPA action under the CAA, as well as "any other nationally applicable regulations promulgated, or final action taken" by EPA under the Act. 42 U.S.C. § 7607(b)(1).

There is no dispute that in this case the Sierra Club's petition is not "based solely on grounds arising after" 1994. Although Sierra Club has asserted that the 2002, 2003, and 2006 rules "*completely* changed the *regulatory context* for [the] SSM exemption," Pet. App 9a (second emphasis added), Sierra Club's challenge is unquestionably aimed at the 1994 exemption itself. Whether or not Sierra Club's petition is based *partly* on grounds arising after 2002, clearly it is not based *solely* on such grounds.

The text of the Clean Air Act provides an unambiguous answer to petitioner's challenge: it is years too late. The decision below, however, discarded the statutory time limits prescribed by Congress. Instead, the court reasoned that EPA's changes to the SSM plan requirements had "significantly altered the stakes of judicial review," and thus concluded that "[t]he fact that the regulatory terms defining the general duty itself are unchanged is legally irrelevant." Pet. App. 11a (internal quotations and alteration omitted).

To support its decision, the court of appeals provided an extremely one-sided summary of the regulatory history of SSM plan requirements. But more importantly, it offered no explanation of why this regulatory history has any relevance to the text of the Clean Air Act, which bars Sierra Club's challenge. Instead, it relied on a handful of earlier D.C. Circuit cases, principally *Kennecott Utah Copper Corp.* v. *United States Department of Interior*, 88 F.3d 1191 (D.C. Cir. 1996), that have employed the "constructive reopening" device. Pet. App. 9a–11a. Such a text-free approach to statutory construction conflicts with this Court's long-standing and consistent doctrine: "Where the language is plain and admits of no more than one meaning, the duty of

interpretation does not arise and the rules which are to aid doubtful meanings need no discussion." *Caminetti* v. *United States*, 242 U.S. 470, 485 (1917).

One might imagine that such a departure from the statutory text was motivated by strong policy concerns, but there is no practical advantage to the constructive reopening device. A long-standing rule is not completely shielded from review by the running of the statutory time period for a petition. As Judge Randolph explained, "Sierra Club has another option: it may file a petition to rescind those regulations and, if EPA denies the petition, Sierra Club may seek judicial review of EPA's action." Pet. App. 20a.

While this procedure would cause Sierra Club almost no trouble, it would provide EPA, the public, and the reviewing court clear benefits. Faced with a petition to rescind, EPA could address the validity of its 1994 regulation in a non-litigation setting and within the context of its overall responsibilities under section 112. Equally important, other stakeholders, such as the States, industry, and other non-governmental organizations, could present their views and defend their interests. And, if EPA decided to rescind its regulation, it would have to do so through notice-and-comment rulemaking. *See Motor Vehicles Mfrs. Ass'n of U.S.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42–43 (1983). This procedure would allow the agency to make an informed decision based on the comments of all stakeholders. Finally, it would create a record that would serve as the basis for the court of appeals' review of the agency's action.

Furthermore, as Judge Randolph noted, the constructive reopening doctrine "implies that each time EPA changes an emissions regulation, it risks subjecting every related regulation to challenges from

third parties." Pet. App. 19a. And, of course, the doctrine is not limited to Clean Air Act regulation. Kennecott was a case challenging regulations issued under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 *et seq.* 88 F.3d 1191. In almost every area of administrative law, each new regulation changes the "regulatory context" for numerous other regulations. Thus, the statutory time limits for review contained in the Hobbs Act, 28 U.S.C. § 2341 *et seq.*, as well as other specific judicial review statutes similar to CAA section 307(b)(1), are in danger of being compromised by this ruling. Here, for example, the decision radically altered the regulatory context for current MACT standards for section 112 source categories that rely on the general duty. Before the ruling below, the otherwise applicable MACT standard did not apply during SSM events; now, under the panel's ruling, it will. There is no doubt that the decision below "'significantly alter[ed] the stakes of judicial review'" of these source-specific MACT standards. Pet. App. 11a. Under the decision below, each such standard may now be challenged regardless of the Clean Air Act's explicit deadline.

This unravels the regular ordering of the administrative process. It unfairly disadvantages those parties that rely on the notice-and-comment procedure of the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.* And, it rewards parties that ambush agencies in litigation before they have been able to consider their regulation in a non-litigation context. EPA's proposed MACT standard for stationary reciprocating internal combustion engines, which followed the circuit court's decision in this case, reaffirms the wisdom of allowing the agency to develop its record in a non-litigation context. For this

category of sources, the agency has been able to seek views on how long a "start up" period should be and consider the fact that use of the catalytic controls during malfunction could render them ineffective during normal operations. 74 Fed. Reg. at 9710–11. Such tailoring of the MACT standards to the applicable physical conditions has not been possible for the large number of source categories for which the decision below made the established MACT standard applicable at all times regardless of particular problems and safety considerations present during SSM events. This approach does not foster the reasoned decision-making promoted by established administrative procedures. Instead, it pushes administrative disputes into the federal courts.

II. THE CONSTRUCTIVE REOPENING DOCTRINE CREATES A CIRCUIT SPLIT.

Given that the constructive reopening doctrine violates the plain text of the Clean Air Act and the animating principles of administrative procedure, it is not surprising that it conflicts with the decisions of several circuit courts of appeals. The D.C. Circuit, of course, handles many petitions for review, so its decision, even standing alone, would warrant this Court's review because of the practical importance of its holding. But other circuits have repeatedly rejected the approach taken by the D.C. Circuit, holding that if a party wants to challenge a regulation after statutory time limits have passed, it must first petition the agency to rescind the challenged regulation.

The Fifth, Ninth, and Eleventh Circuits have emphasized that the petition-to-rescind procedure is faithful to the text of statutory time limitations, while at the same time allowing for review of older regulations that are alleged to be *ultra vires*. In

Dunn-McCampbell Royalty Interest, Inc. v. *National Park Service*, 112 F.3d 1283 (5th Cir. 1997), the Fifth Circuit addressed a 1994 challenge to 1978 National Park Service regulations. *Id.* at 1285–86. The court held that the challenge was barred by the general six-year statute of limitations for civil actions against the government, 28 U.S.C. § 2401(a). *Dunn-McCampbell*, 112 F.3d at 1286–88. It noted: "If Dunn-McCampbell were able to point to . . . an application of the regulations [to Dunn-McCampbell] here, or if they had petitioned the National Park Service to change the . . . regulations and been denied, this court might have jurisdiction to hear that case." *Id.* at 1287–88.

The Fifth Circuit relied on a Ninth Circuit decision and a 1990 decision of the D.C. Circuit:

> The Ninth Circuit, for example, has held that a challenger may contest an agency decision as exceeding constitutional or statutory authority after the limitations period, but only by petitioning the agency to review the application of the regulation to that particular challenger. *Wind River Mining Corp. v. United States*, 946 F.2d 710, 715 (9th Cir.1991). Although the *Wind River* Court never said so explicitly, the court treated the agency's denial of that petition as a "final agency action" sufficient to create a new cause of action under the APA.
>
> Similarly, in *Public Citizen v. Nuclear Regulatory Commission*, the D.C. Circuit held that it had jurisdiction to hear a substantive challenge after the limitations period had run. 901 F.2d 147, 152 (D.C.Cir.[1990]). In that case, the claimant filed a petition with the agency to rescind regulations, then challenged the agency's denial of the petition in federal court.

Id. at 1287 (subsequent history citation omitted).

The *Wind River* decision is similarly instructive. In 1987, the Wind River mining company petitioned the Bureau of Land Management (BLM) to rescind its 1979 decision to classify certain land as a Wilderness Study Area. *Wind River Mining Corp.* v. *United States*, 946 F.2d 710, 711–12 (9th Cir. 1991). The company alleged that the land did not meet the statutory requirements for this classification. *Id.* at 711. When BLM refused, the company filed suit in federal court. *Id.* at 712. Although the Ninth Circuit concluded that 28 U.S.C. § 2401(a)'s six-year requirement applied to the company's claim, *id.* at 713, it held that the claim was timely because of the 1987 petition to rescind. *Id.* at 716. It concluded that if "a challenger contests the substance of an agency decision as exceeding constitutional or statutory authority, the challenger may do so later than six years following the decision by filing a complaint for review of the adverse application of the decision to the particular challenger," reasoning that "[t]he government should not be permitted to avoid all challenges to its actions, even if *ultra vires*, simply because the agency took the action long before anyone discovered the true state of affairs." *Id.* at 715.

The Eleventh Circuit has also held that a litigant may challenge the substantive validity of an older regulation through the petition-to-rescind procedure. See *Legal Envtl. Assistance Found., Inc.* v. *U.S. EPA*, 118 F.3d 1467, 1473 (11th Cir. 1997) ("[I]n the course of reviewing EPA's order denying LEAF's petition, over which our jurisdiction is not questioned, we also have jurisdiction to entertain LEAF's contention that the regulations upon which EPA relies are contrary to statute and therefore invalid, regardless of the fact that LEAF's challenge is brought outside the

statutory period for a direct challenge to the regulations.") (interpreting the Safe Drinking Water Act's judicial review provision, 42 U.S.C. § 300j-7(a)(2)).

Other circuits have reached the same conclusion, on the basis that requiring an initial petition to rescind allows for creation of a record and a considered decision by the agency made outside of the litigation context. The Eighth Circuit and even the D.C. Circuit followed this reasoning in relatively early Clean Air Act cases. The courts were interpreting section 307(b)(1) of the 1970 Clean Air Act, which provided: "A petition for review .... shall be filed within 30 days from the date of such promulgation, approval, or action, or after such date if such petition is based solely on grounds arising after such 30th day." 42 U.S.C. § 1857h–5(b)(1) (current version at 42 U.S.C. § 7607(b)(1)). The Eighth Circuit concluded that if a petitioner wanted to bring a challenge outside of the thirty day limit, it must first present the request to the agency, even if the petition was based on new grounds. *Union Elec. Co.* v. *EPA*, 515 F.2d 206, 220 (8th Cir. 1975), *aff'd*, 427 U.S. 246 (1976). Relying on legislative history, and the need to develop a record at the agency before an appeal, the court reasoned:

> The Senate Report indicates that it is only when the Administrator fails to act upon the basis of the new information that review is proper under § 307, implying that the information would have to be brought to the Administrator's attention. The petition for review in this circumstance would be a challenge to the Administrator's action and would require a scrutiny of the administrative record available to the Administrator to determine whether a clear error of

> judgment had been shown. It would not require that this court in the first instance develop a record on the challenges.

Id. at 220. Thus, the court concluded that "[i]t is only when the Administrator fails to act upon the basis of the new information presented to him that a petition for review is proper." *Id.*

In *Oljato Chapter of Navajo Tribe* v. *Train*, 515 F.2d 654 (D.C. Cir. 1975), the D.C. Circuit adopted the Eighth Circuit's approach, stating:

> we find no substantive difference between direct review of a new information challenge and review of the Administrator's refusal to revise a standard when presented with new information. In both cases a revision would be ordered only if it would be arbitrary and capricious to do otherwise. We think, however, that review of the Administrator's refusal is a considerably more desirable approach. Such a procedure would avoid litigation when the Administrator acceded to a request and, when he did not, it would present us with an administrative record, including the Administrator's views in a nonlitigation context, a judicially recognized distinction of importance.

Id. at 666. Ordinarily, the Court is not concerned when there appears to be an intra-circuit conflict and thus the presence of an earlier D.C. Circuit ruling would not be relevant to certiorari. But given the dominance of the D.C. Circuit in reviewing agency rulemakings, tension among decisions within that Circuit should operate much the way it does when the Court is reviewing decisions of the Federal Circuit on subjects over which it has all but exclusive authority. Thus, Judge Randolph's dissent, which relies heavily

upon previous Circuit holdings, provides an unusually strong basis for this Court's review in this case.

The Fifth Circuit has also endorsed these principles in the context of the Clean Water Act in *Save the Bay, Inc.* v. *EPA*, 556 F.2d 1282 (5th Cir. 1977). The court embraced *Oljato*, noting that the petition-to-rescind procedure would "ensure orderly development of the issues and the record, as well as . . . promote the full and objective application of the agency's expertise." *Id.* at 1289.

Thus, other courts of appeals have reached agreement on the proper procedure for substantive challenges to agency regulations outside the statutorily prescribed review period: such challenges must be brought through a petition to rescind. Such a rule honors the statutory text, and the principles of administrative law. The decision below is an egregious departure from the decisions of the other circuits, and even from earlier decisions of the D.C. Circuit. And it is an extremely important departure because of the D.C. Circuit's special role in reviewing agency regulations. Accordingly, this Court should grant the petition.

III. THE PRACTICAL IMPACT OF THE DECISION BELOW MAKES IT PARTICULARLY WORTHY OF REVIEW.

The substantive conclusion of the court below reinforces the need for review. The court of appeals provided little independent reasoning for invalidating the 1994 Rule. Instead, it relied on a supposed agency admission that the general duty to follow "good air pollution control practices for minimizing emissions," 40 C.F.R. § 63.6(e)(1)(i), is "not a section 112–compliant standard." Pet. App. 15a. This

reasoning aggravates the court's mistaken reopening decision, because it means that EPA may reverse a well-settled rule without any administrative process or notice to interested parties. According to the court, EPA's appellate brief as respondent below suddenly reversed a position that the agency had adopted in notice-and-comment rulemaking and then maintained for 14 years. This reasoning is inconsistent with this Court's holdings on rescinding a regulation, see *Motor Vehicles Mfrs.*, 463 U.S. at 42–43, and with the distinction this Court has drawn between agency interpretations promulgated under delegated congressional authority and those asserted in litigation papers. *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988).

The decision reached by this faulty reasoning threatens to overturn EPA's complex and well-developed NSPS program, which was established well over 30 years ago. As noted, the general SSM duty for section 112 is modeled on the NSPS standard under section 111. Although NSPS standards are known as "standards of performance" rather than "emission standards," the Clean Air Act defines a "standard of performance" as an "emission limitation," 42 U.S.C. § 7411(a)(1), which is defined as equivalent to an "emission standard." *Id.* § 7602(k). Thus, NSPS standards are now vulnerable to a similar challenge.

This decision also presents the unusual case of practical consequences so stark that they warrant review. The decision holds sources experiencing unavoidable malfunctions liable for failing to comply with MACT rules that were promulgated on the understanding that they would not apply during

startups, shutdowns, or malfunctions.[4] As noted, MACT standards are set so that they are at least as stringent as "the emission control that is achieved in practice by the best controlled similar source." *Id.* § 7412(d)(3). And when EPA set these standards, it generally did not consider the emission control achieved in practice by sources during SSM events, because those events were covered by the general duty to minimize emissions at such times. See 74 Fed. Reg. at 9710. Indeed, EPA still has not even collected *data* on these emissions. *Id.* But under the decision below, a source that is starting up, shutting down, or has malfunctioned will be held to the emission standards achieved by the best sources during *normal operation*, even though "it is technically impossible to properly operate" many required pollution control technologies during "unpredicted and reasonably unavoidable failures of air pollution control systems." 58 Fed. Reg. at 42,777; 74 Fed. Reg. at 9710–11.

If the D.C. Circuit's decision is implemented, the government could prosecute sources that unavoidably fail to comply with MACT limits. And even if it does not, Clean Air Act section 304 provides for citizen suits. 42 U.S.C. § 7604. Thus, any party seeking to punish an emission source for any reason, environmental or otherwise, or simply seeking attorneys fees, see *id.* § 7604(d), can sue these sources and claim a violation of section 112 that was never contemplated when the 1994 Rule was adopted. Given the CAA's

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[4] As EPA has recognized, it can take 15 to 30 minutes of operation for exhaust gas temperatures to reach the temperature levels where certain catalytic controls become effective, and attempting to use these controls during startup or malfunction could compromise their overall effectiveness. 74 Fed. Reg. at 9710.

penalties, which include civil and criminal sanctions, *id.* § 7413(b); 40 C.F.R. § 19.4; 42 U.S.C. § 7413(c)(1), this decision threatens industry with substantial, unavoidable liability and irreparable harm.

Thus, the decision below presents a particularly important question of federal law because of its implications for administrative procedure, the Clean Air Act, and the national economy.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

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October 22, 2009

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS, DISTRICT OF COLUMBIA CIRCUIT

Nos. 02-1135, 03-1219, 06-1215, 07-1201

SIERRA CLUB,
Petitioner

v.

ENVIRONMENTAL PROTECTION AGENCY and STEPHEN L. JOHNSON, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY,
Respondents

AMERICAN CHEMISTRY COUNCIL, *et al.*,
Intervenors

Argued Sept. 12, 2008
Decided Dec. 19, 2008

Before ROGERS, TATEL, *Circuit Judges*, and RANDOLPH, *Senior Circuit Judge*.

Opinion for the Court by *Circuit Judge* ROGERS.

Dissenting opinion by *Senior Circuit Judge* RANDOLPH.

ROGERS, *Circuit Judge*:

Petitioners challenge the final rules promulgated by the Environmental Protection Agency exempting major sources of air pollution from normal emission standards during periods of startups, shutdowns, and

malfunctions ("SSM") and imposing alternative, and arguably less onerous requirements in their place.[1] Because the general duty that applies during SSM events is inconsistent with the plain text of section 112 of the Clean Air Act ("CAA"), even accepting that "continuous" for purposes of the definition of "emission standards" under CAA section 302(k) does not mean unchanging, the SSM exemption violates the CAA's requirement that some section 112 standard apply continuously. Accordingly, we grant the petitions and vacate the SSM exemption.

I.

CAA section 112 designates over one hundred pollutants as "hazardous," 42 U.S.C. § 7412(b)(1), and directs the Administrator of EPA to list all categories of "major sources" of hazardous air pollutants ("HAPs"), *id.* § 7412(c)(1), and to establish for each "emissions standards" requiring "the maximum degree of reduction in emissions," *id.* § 7412(d)(2). These controls are referred to as maximum achievable control technology ("MACT") standards. *See Natural Resources Def. Council v. EPA*, 489 F.3d 1364, 1368 (D.C.Cir.2007). Section 112 also sets a "MACT floor," *id.*, requiring that standards "shall not be less stringent than the emission control that is achieved in practice by the best controlled similar source," 42 U.S.C. § 7412(d)(3). After eight years, under section 112(f), EPA is to revisit and potentially revise the emissions standards for each source category to ensure that they "provide an ample margin of safety to protect public health," *id.* § 7412(f)(2)(A). "Emission standard" is defined in section 302(k) as "a requirement established by the State or the Administrator

[1] 40 C.F.R. § 63.6(e)(*1*)(i), (f)(1), and (h)(1).

which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction, and any design, equipment, work practice or operational standard promulgated under this chapter." 42 U.S.C. § 7602(k).

In addition to revising section 112, the 1990 Amendments also added Title V, which establishes a permit program to better monitor compliance with emissions standards. "Each permit . . . shall include enforceable emission limitations and standards, a schedule of compliance, . . . and such other conditions as are necessary to assure compliance with applicable requirements of this chapter." *Id.* § 7661c(a). Sources are required to certify that they are in compliance with the applicable requirements of the permit "and to promptly report any deviations from permit requirements to the permitting authority." *Id.* § 7661b(b)(2). Title V further creates a "permit shield" for sources, ensuring that compliance with the permit is "deemed compliance with other applicable provisions" of the CAA. *Id.* § 7661c(f). "Any permit application, compliance plan, permit, and monitoring or compliance report" under Title V must be "ma[d]e available to the public." *Id.* § 7661a(b)(8).

In the 1970s EPA had determined that excess emissions during SSM periods are not considered violations of CAA emissions standards under section 111.[2] Although sources were "exempt[ed] from com-

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[2] *Standards of Performance for New Stationary Sources*, 42 Fed.Reg. 57,125 (Nov. 1, 1977); *see, e.g.*, 51 Fed.Reg. 27,956, 27,970 (Aug. 4, 1986). Section 111 left to the Administrator's discretion the establishment of emissions standards for pollutants from sources while section 112 mandated the establish-

pliance with numerical emissions limits" during SSM events, 42 Fed.Reg. 57,125, EPA required that "[a]t all times, including periods of [SSM], owners and operators shall, to the extent practicable, maintain and operate any affected facility including associated air pollution control equipment in a manner consistent with good air pollution control practice for minimizing emissions," 40 C.F.R. § 60.11(d). EPA refers to sources' obligation to minimize emissions to the greatest extent possible as the "general duty" standard. *See, e.g.*, 70 Fed.Reg. 43,992, 43,993 (July 29, 2005).

In 1994, EPA adopted the SSM exemption for section 112. *National Emission Standards for [HAPs] for Source Categories: General Provisions*, 59 Fed.Reg. 12,408 (Mar. 16, 1994) ("1994 Rule").[3] Each source was thus exempted from the numerical limits set for emission control pursuant to section 112 and only the general duty would apply. However, in order to avoid a blanket exemption, EPA required each source to develop and implement an SSM plan. "The purpose of the plan [was] for the source to demonstrate how it will do its reasonable best to maintain compliance with the standards, even during [SSMs]." *Id.* at 12,423. Each SSM plan was to "describe[ ], in detail, procedures for operating and maintaining the source during periods of [SSM] and a program of corrective action for malfunctioning process and air pollution control equipment used to comply with the relevant stan-

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ment of emissions standards for over 100 HAPs. *See New Jersey v. EPA*, 517 F.3d 574, 580 n. 1 (D.C.Cir.2008).

[3] "The General Provisions have the legal force and effect of standards, and they may be enforced independently of relevant standards." 59 Fed.Reg. at 12,408. The requirements of the General Provisions are superceded by any category-specific standard. *See id.* at 12,409.

dard." *Id.* at 12,439. The EPA Administrator could require changes to the SSM plan if it was inadequate. *Id.* at 12,440. The plan was incorporated by reference into the source's Title V permit, 59 Fed.Reg. at 12,439, and thereby subject to prior approval by the State permitting authority, 58 Fed.Reg. 42,760, 42,768 (Aug. 11, 1993). Under the CAA, the SSM plan was to be made publicly available, 42 U.S.C. § 7661a(b)(8), and served as a safe harbor during SSM events, *id.* § 7661c(f).

In 2002, EPA removed the requirement that a source's Title V permit incorporate the SSM plan, and instead determined that a source's Title V permit must simply require the source to adopt an SSM plan and to abide by it.[4] Because the SSM plan was no longer itself part of the permit and could be revised without formal revision of the permit, it was no longer subject to prior approval, and was no longer eligible for the permit shield. *Id.* Additionally, "to minimize the unnecessary production of the SSM plan," 66 Fed.Reg. 16,318, 16,326 (Mar. 23, 2001), the SSM plan was to be made publicly available only upon request. *Id.* The Sierra Club sought reconsideration and filed a petition for review of the 2002 Rule, and as part of a settlement agreement, EPA proposed "modest" changes to the SSM plan regulations, 67 Fed.Reg. 72,875, 72,879 (Dec. 9, 2002), namely that sources must submit their SSM plans to the permitting authority along with their Title V permit applications.

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[4] *National Emission Standards for Hazardous Air Pollutants for Source Categories: General Provisions; and Requirements for Control Technology Determinations for Major Sources in Accordance with Clean Air Act Sections, Sections 112(g) and 112(j)*, 67 Fed.Reg. 16,582 (Apr. 5, 2002) ("2002 Rule").

In the final rule adopted in 2003, however, EPA "decided instead to adopt a less burdensome approach,"[5] requiring members of the public to make a "specific and reasonable request" of the permitting authority to request the SSM plan from the source. 68 Fed.Reg. at 32,591. The Sierra Club challenged the 2003 Rule in a new petition for review, which was consolidated with its previous challenge. The Natural Resources Defense Council ("NRDC") also filed a petition for reconsideration on the ground that any limitation on the public availability of the SSM plans was unlawful. EPA agreed to take comment on the new SSM provisions, and the consolidated cases were held in abeyance pending reconsideration.

In 2006, EPA retracted the requirement that sources implement their SSM plans during SSM periods.[6] According to EPA, "[t]his is consistent with the concept that the plan specifics are not applicable requirements [under Title V] and thus cannot be required to be followed. Nonetheless, the general duty to minimize emissions remains intact and is the applicable requirement." 70 Fed.Reg. 43,992, 43,994 (Jul. 29, 2005). Post-event reporting requirements provided that sources must describe what actions were taken to minimize emissions "any time there is an exceedance of an emission limit . . . and thus a possibility that the general duty requirement was violated." 71 Fed.Reg.

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[5] *National Emission Standards for Hazardous Air Pollutants for Source Categories: General Provisions; and Requirements for Control Technology Determinations for Major Sources in Accordance with Clean Air Act Sections, Sections 112(g) and 112(j)*, 68 Fed.Reg. 32,586, 32,591 (May 30, 2003) ("2003 Rule").

[6] *National Emission Standards for Hazardous Air Pollutants: General Provisions*, 71 Fed.Reg. 20,446, 20,447 (Apr. 20, 2006) ("2006 Rule").

at 20,448. EPA clarified that reporting and record-keeping is only required when a start up or shut down caused the applicable emission standard to be exceeded, and "for any occurrence of malfunction which also includes potential exceedances." *Id.* at 20,447. EPA also eliminated the requirement that the Administrator obtain a copy of a source's SSM plan upon request from a member of the public and determined that the public may only access those SSM plans obtained by a permitting authority. The permitting authorities, in turn, "still have the discretion to obtain plans requested by the public, but will not be required to do so." *Id.*

Petitioners[7] now contend that the exemption from compliance with emissions standards during SSM events is both unlawful and arbitrary, and that the 2002, 2003, and 2006 rules unlawfully and arbitrarily fail to "assure compliance" with "applicable requirements" under Title V. Upon determining that we have jurisdiction, we turn to petitioners' challenges to the rules.

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[7] The Coalition for a Safe Environment ("CFASE") petitioned for reconsideration of EPA's conclusion that a source's "Title V permit will assure its compliance with the general duty to minimize emissions during [SSM] events merely by requiring the facility to file a report *after* such an event." CFASE, Comment Letter, Petition for Reconsideration of "National Emission Standards for Hazardous Air Pollutants: General Provisions," 71 Fed.Reg. 20,446 (June 19, 2006). EPA denied reconsideration, 72 Fed.Reg. 19,385 (Apr. 18, 2007), and CFASE petitioned for review. This petition along with the other challenges to the 2006 Rule were consolidated with the previous petitions for review.

II.

The CAA provides that "[a]ny petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register." 42 U.S.C. § 7607(b)(1). EPA maintains that petitioners have waived their challenge to the SSM exemption by not challenging the 1994 Rule articulating that the general duty standard replaces section 112 emissions standards during SSM events. Petitioners, noting that "EPA received repeated comments on the illegality of its SSM exemption in the course of its rulemaking—which covered more than six years, generated three separate proposals and necessitated three petitions for reconsideration," Petrs. Br. 29, respond that "rulemakings that significantly change the context for a regulatory provision can re-open it for comment, even if an agency does not change the provision itself," *id.*, and that this is what happened here.

Under the reopening doctrine, the time for seeking review starts anew where the agency reopens an issue "by holding out the unchanged section as a proposed regulation, offering an explanation for its language, soliciting comments on its substance, and responding to the comments in promulgating the regulation in its final form." *Am. Iron & Steel Inst. v. EPA*, 886 F.2d 390, 397 (D.C.Cir.1989); *see P & V Enters. v. U.S. Army Corps of Eng'rs.*, 516 F.3d 1021, 1023-24 (D.C.Cir.2008); *Ohio v. EPA*, 838 F.2d 1325, 1328 (D.C.Cir.1988). In its 2003 rulemaking, EPA discussed revisions to its SSM plan requirements, but asserted that "[n]othing in these revisions is intended . . . to change the general principle that compliance with a MACT standard is not mandatory during periods of [SSM]." 67 Fed.Reg. at 72,880. In response to Sierra Club's comments questioning the legality of the SSM

exemption, EPA stated: "We believe that we have discretion to make reasonable distinctions concerning those particular activities to which the emission limitations in a MACT standard apply, and we, therefore, disagree with the legal position taken by the Sierra Club." 2003 Rule, 68 Fed.Reg. at 32,590. However, "when the agency merely responds to an unsolicited comment by reaffirming its prior position, that response does not create a new opportunity for review. Nor does an agency reopen an issue by responding to a comment that addresses a settled aspect of some matter, even if the agency had solicited comments on unsettled aspects of the same matter." *Kennecott Utah Copper Corp. v. Dep't of Interior*, 88 F.3d 1191, 1213 (D.C.Cir.1996); *see also Am. Iron*, 886 F.2d at 398. Moreover, when EPA received unsolicited comments on this issue in its 2006 rulemaking, it explained that "[t]hese commenters raise issues that are outside of the scope of this rulemaking. The general duty provision has been in place since 1994." 71 Fed.Reg. at 20,449; *cf. PanAmSat Corp. v. FCC*, 198 F.3d 890, 897 (D.C.Cir.1999). Such agency conduct is not tantamount to an *actual* reopening.

However, petitioners contend that the 2006 Rule "has *completely* changed the regulatory context for its SSM exemption by stripping out virtually all of the SSM plan requirements that it created to contain that exemption." Petrs. Br. at 29. In *Kennecott*, this court established that an "agency's decision to adhere to the *status quo ante* under changed circumstances" can "constructively reopen[ ]" a rule "by the change in the regulatory context." 88 F.3d at 1214. A constructive reopening occurs if the revision of accompanying regulations "significantly alters the stakes of judicial review," *id.* at 1227, as the result of a change that

"could have not been reasonably anticipated," *Envtl. Def. v. EPA*, 467 F.3d 1329, 1334 (D.C.Cir.2006).

Petitioners recount, and EPA does not dispute, that:

> To avoid creating a "blanket exemption from emission limits," EPA's 1994 rule required that (1) sources comply with their SSM plans during periods of SSM; (2) SSM plans be reviewed and approved by permitting authorities like any other applicable requirement; (3) SSM plans be unconditionally available to the public, which could participate in evaluating their adequacy in the permit approval process; and (4) SSM plan provisions be directly enforceable requirements. 59 Fed.Reg. at 12423[ ]. In the rulemakings challenged here, however, EPA has eliminated all of these safeguards. SSM plans are no longer enforceable requirements, and EPA has expressly retracted the requirement that sources comply with them. 71 Fed.Reg. at 20447[ ]. EPA also has eliminated any requirement that SSM plans be vetted for adequacy and any opportunity for citizens to see or object to them. *Id.*[ ].

Petrs. Br. at 29-30. These are not mere "minor changes," *Envtl. Def.*, 467 F.3d at 1333. In so modifying the SSM plan requirements, EPA has constructively reopened the SSM exemption. While the text of the general duty itself did not change, "EPA has *completely* changed the regulatory context for its SSM exemption by stripping out virtually all of the SSM plan requirements that it created to contain the exemption." Petrs. Br. at 29 (emphasis in original).

EPA's modifications to the SSM plan requirements created a different regulatory construct as to the means of measuring compliance with the general duty.

Because the general duty does not include any "numerical emissions limits," 42 Fed.Reg. at 57,125, the general duty assumes new shape depending on the means used to capture that standard. In 1994, EPA determined that compliance with the general duty on its own was insufficient to prevent the SSM exemption from becoming a "blanket" exemption. It established the SSM plan requirements precisely because the general duty was inadequate. Now EPA has removed these necessary safeguards. Because the general duty was defined in 1994 through and housed in the four walls of the SSM plan requirements, EPA's modifications to those requirements have eliminated the only effective constraints that EPA originally placed on the SSM exemption. The fact that the regulatory terms defining "the general duty" itself are unchanged is legally irrelevant because the other "extensive changes . . . significantly alter[ed] the stakes of judicial review," *Kennecott*, 88 F.3d at 1226-27. Just as the court in *Kennecott* agreed with industry that the agency had constructively reopened a regulation when it incorporated amended regulations that expanded available remedies and thus altered its financial incentives for challenging the regulation, so too here from the perspective of environmental petitioners' interests and allocation of resources the general duty "may not have been worth challenging in [1994], but the [revised] regulations gave [that duty] a new significance," *id.* at 1227. In *Kennecott*, there were "new and potentially more onerous provisions," *id.*, facing industry; here petitioners face a blanket exemption and a more onerous task in effecting compliance with HAP emission standards during SSM events.

Although EPA asserts that "the duty to minimize emissions is not inextricably linked to the SSM plan," Resp. Br. at 24, the rulemaking record shows that

"the general duty requirement and the SSM plan requirements were both elements of a package deal that EPA devised and sold to the public as adequate protection from [HAPs] during SSM events," Petrs. Reply Br. at 12. When commenters raised objections to the SSM exemption in 1994, EPA's direct response relied upon the SSM plan as a justification for the relaxed standard:

> "The EPA believes, as it did at proposal, that the requirement for a[n] [SSM] plan is a reasonable bridge between the difficulty associated with determining compliance with an emission standard during these events and a blanket exemption from emission limits. The purpose of the plan is for the source to demonstrate how it will do its reasonable best to maintain compliance with standards, even during [SSMs]."

59 Fed.Reg. at 12,423. EPA attempts now to dismiss this statement as mere "inartful[ ] word[ing]," Resp. Br. at 27, but the fact that EPA's entire discussion of the proper standard to apply during SSM events invoked the SSM plan provisions confirms that the SSM plan and general duty standard are inextricably linked. Indeed, the explicit purpose of the SSM plan as devised in 1994 was to "ensure" that facility owners abide by the general duty. 59 Fed.Reg. at 12,439.

Shifting from a regulatory scheme based on a mandatory SSM plan that was part of a source's Title V permit, which is subject to prior approval with public involvement, *see* 42 U.S.C. § 7661a(b)(6), to a regulatory scheme with a non-mandatory plan providing for no such approval or involvement but only after-the-fact reporting changed the calculus for petitioners in seeking judicial review, *id.*, and thereby constructively reopened consideration of the exemption from section

112 emission standards during SSM events. Petitioners' challenges to the SSM exemption are therefore timely.

III.

On the merits, petitioners contend that EPA's decision to exempt major sources from compliance with section 112 emissions standards during SSM events is contrary to the plain text of the statute and arbitrary and capricious in any event. EPA and Industry Intervenor respond that EPA's general-duty requirement during SSM events is a lawful interpretation of the statute and a reasonable way to reconcile the need to minimize emissions with the inherent technological limitations during SSM events. Challenges to EPA's interpretation of the CAA are governed by *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), in which "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Only if the statute is silent or ambiguous on a particular issue, may the court defer to the agency's reasonable interpretation. *Id.* at 844, 104 S.Ct. 2778. The CAA provides that the court may reverse any agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 42 U.S.C. § 7607(d)(9)(A).

Section 112(d) provides that "[e]missions standards" promulgated thereunder must require MACT standards. 42 U.S.C. § 7412(d)(2). Section 302(k) defines "emission standard" as "a requirement established by the State or the Administrator which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction,

and any design, equipment, work practice or operational standard promulgated under this chapter." *Id.* § 7602(k). Petitioners contend that, contrary to the plain text of this definition, "EPA's SSM exemption automatically excuses sources from compliance with emission standards whenever they start up, shut down, or malfunction, and thus allows sources to comply with emission standards on a basis that is not 'continuous.'" Petrs. Br. at 23. EPA responds that the general duty that applies during SSM events "along with the limitations that apply during normal operating conditions, together form an uninterrupted, *i.e.*, continuous, limitation because there is no period of time during which one or the other standard does not apply," Respt.'s Br. at 31. "Although *Chevron* step one analysis begins with the statute's text," the court must examine the meaning of certain words or phrases in context and also "exhaust the traditional tools of statutory construction, including examining the statute's legislative history to shed new light on congressional intent, notwithstanding statutory language that appears superficially clear." *Am. Bankers Ass'n v. Nat'l Credit Union Admin.*, 271 F.3d 262, 267 (D.C.Cir. 2001) (citations and quotation marks omitted).

EPA suggests that the general duty is "part of the operation and maintenance requirements with which all sources subject to a section 112(d) standard must comply," Respt.'s Br. at 33, pointing to section 302(k)'s statement that an "emission standard" includes "any requirement relating to the operation or maintenance of a source to assure continuous emission reduction," 42 U.S.C. § 7602(k). Section 302(k)'s inclusion of this broad phrase in the definition of "emission standard" suggests that emissions reduction requirements "assure continuous emission reduction" without necessarily continuously applying a single standard. Indeed,

this reading is supported by the legislative history of section 302(k):

> By defining the terms "emission limitation," "emission standard," and "standard of performance," the committee has made clear that constant or continuous means of reducing emissions must be used to meet these requirements. By the same token, intermittent or supplemental controls or other temporary, periodic, or limited systems of control would not be permitted as a final means of compliance.

H.R. Rep. 95-294, at 92 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 1077, 1170. "Congress's primary purpose behind requiring regulation on a continuous basis" appears, as one circuit has suggested, to have been "to exclude intermittent control technologies from the definition of emission limitations," *Kamp v. Hernandez*, 752 F.2d 1444, 1452 (9th Cir.1985).

When sections 112 and 302(k) are read together, then, Congress has required that there must be continuous section 112-compliant standards. The general duty is not a section 112-compliant standard. Admitting as much, EPA states in its brief that the general duty is neither "a separate and independent standard under CAA section 112(d)," nor "a free-standing emission limitation that must independently be in compliance" with section 112(d), nor an alternate standard under section 112(h). Respt.'s Br. 32-34. Because the general duty is the only standard that applies during SSM events—and accordingly no section 112 standard governs these events—the SSM exemption violates the CAA's requirement that some section 112 standard apply continuously. EPA has not purported to act under section 112(h), providing that a standard may be relaxed "if it is not feasible in the judgment of

the Administrator to prescribe or enforce an emission standard for control of a [HAP]," *id.* § 7412(h)(1), based on either a (1) design or (2) source specific basis, *id.* § 7412(h)(2)(A), (B).

EPA's suggestion that it has "discretion to make reasonable distinctions concerning those particular activities to which the emission limitations in a MACT standard apply," 68 Fed.Reg. at 32,590, belies the text, history and structure of section 112. "In 1990, concerned about the slow pace of EPA's regulation of HAPs, Congress altered section 112 by eliminating much of EPA's discretion in the process." *New Jersey*, 517 F.3d at 578. In requiring that sources regulated under section 112 meet the strictest standards, Congress gave no indication that it intended the application of MACT standards to vary based on different time periods. To the contrary, Congress specifically permitted the Administrator to "distinguish among classes, types, and sizes of sources within a category or subcategory in establishing such standards," CAA § 112(d)(1), 42 U.S.C. § 7412(d)(1). Additionally, while recognizing that in some instances it might not be feasible to prescribe or enforce an emission standard under § 112, Congress provided in section 112(h) for establishment of "work practice" or "operational" standards instead, but, as petitioners point out, "strictly limited this exception by defining 'not feasible . . .' to include only [two types of] situations," Petrs. Br. 9, and did not authorize the Administrator to relax emission standards on a temporal basis. *See NRDC*, 489 F.3d at 1374.

In sum, petitioners' challenge to the exemption of major sources from normal emission standards during SSM is premised on a rejection of EPA's claim of retained discretion in the face of the plain text of sec-

tion 112. "Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of a contrary legislative intent." *NRDC*, 489 F.3d at 1374 (quoting *TRW Inc. v. Andrews*, 534 U.S. 19, 28, 122 S.Ct. 441, 151 L.Ed.2d 339 (2001)). The 1990 Amendments confined the Administrator's discretion, *see New Jersey*, 517 F.3d at 578, and Congress was explicit when and under what circumstances it wished to allow for such discretion, *id.* at 582. "EPA may not construe [a] statute in a way that completely nullifies textually applicable provisions meant to limit its discretion." *New Jersey*, 517 F.3d at 583 (quoting *Whitman*, 531 U.S. at 485, 121 S.Ct. 903).

Accordingly, we grant the petitions without reaching petitioners' other contentions, and we vacate the SSM exemption. *See New Jersey*, 517 F.3d at 583 (citing *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C.Cir.1993)).

RANDOLPH, *Senior Circuit Judge*, dissenting.

I do not agree that we have jurisdiction over Sierra Club's petition for judicial review. The original regulations at issue, 40 C.F.R. § 63.6(e)-(h) (1994), exempt periods of startup, shutdown, and malfunction from opacity and non-opacity emission standards. When EPA promulgated these regulations in 1994, Sierra Club took no legal action. Yet under the Clean Air Act a petition for judicial review of an EPA regulation must be filed within 60 days of the regulation's publication in the Federal Register. 42 U.S.C. § 7607(b)(1).

Of course an agency may give notice and ask for comment on whether an existing regulation should be modified or repealed or retained, or it may indicate in response to comments that it has reconsidered the regulation. *See Kennecott Utah Copper Corp. v. Dep't of Interior*, 88 F.3d 1191, 1214 (D.C.Cir.1996). Or an agency may give its regulation new significance by altering other regulations incorporating it by reference. *See id.* at 1226-27. In any one of these situations the 60-day period would begin to run again. But nothing of the sort occurred here. According to Sierra Club, EPA's rulemakings in 2002, 2003, and 2006 rendered enforcement of the 1994 startup, shutdown, and malfunction regulations more difficult. Petr.'s Br. at 29. Even if true,[1] that could hardly have amounted

[1] The majority opinion makes a factual error when it suggests that the new startup, shutdown, and malfunction regulations have eliminated a prior requirement that EPA approve startup, shutdown, and malfunction plans in the course of its review of Title V permits. Maj. Op. at 1026. In fact, the plans were merely incorporated by reference into Title V permits; there has never been any requirement that EPA review or approve the plans before approving permits. *See* 66 Fed.Reg. 16,318, 16,326 (2001); *see also* 40 C.F.R. § 63.6(e)(3)(viii) (1998); 67 Fed.Reg. 16,582, 16,587 (2002).

to agency "action" re-promulgating the 1994 regulations, which is what § 7607(b)(1) requires as a prerequisite for judicial review. After all, Sierra Club's complaint is not that the 1994 regulations are now hard to enforce; it is instead that the 1994 regulations are invalid and always have been. The recent rules did not alter the exemption for startup, shutdown, and malfunction events. The new rules simply modified requirements for each source's plan regarding implementation of the duty to minimize pollution during the exempt periods. Sierra Club had the option—which it exercised[2]—of challenging the new rules on the ground that the modifications will lead to unacceptable levels of pollution.

In *Kennecott*, regulated industries sought judicial review of an allegedly invalid regulation after changes in related regulations made its enforcement *more* likely and more punitive. Sierra Club has no comparable financial incentives capable of assessment by a court; instead, it presumably has an incentive to challenge any regulatory change that might lead to increased pollution. The majority's rationale implies that each time EPA changes an emissions regulation, it risks subjecting every related regulation to challenges from third parties. Such a regime, and the instability it generates, is intolerable. Perhaps that is why, until today, we have limited the constructive reopening doctrine to cases involving regulated entities. *See Envtl. Def. v. EPA*, 467 F.3d 1329, 1334 (D.C.Cir.2006).

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[2] The majority opinion does not reach Sierra Club's argument that the recent rules fail to guarantee enforcement of applicable emissions standards and therefore violate Title V of the Clean Air Act.

Although EPA did not reopen its 1994 regulations for judicial review, Sierra Club has another option: it may file a petition to rescind those regulations and, if EPA denies the petition, Sierra Club may seek judicial review of EPA's action. *See, e.g., Pub. Citizen v. Nuclear Regulatory Comm'n*, 901 F.2d 147, 152 (D.C. Cir.1990). There is no basis for permitting Sierra Club to circumvent that procedural requirement in this case. *See Kennecott*, 88 F.3d at 1214.

There is another problem with the majority opinion. It disposes of the case with an argument not addressed in the brief of either party—namely, that § 112(h) of the Clean Air Act provides the only basis for EPA to impose a non-numerical emissions standard and that the 1994 regulations are unlawful because they do not comply with the requirements of § 112(h). Sierra Club mentions § 112(h), *see* Petr.'s Br. at 24, but its argument that the 1994 regulations are unlawful rests on § 302(k)'s requirement that "emission standards" must regulate air pollutants on a "continuous basis," *id.* at 23-24. EPA refers to § 112(h) only to state that it is irrelevant to the question whether its "general duty to minimize" is an enforceable standard satisfying the statutory requirement to regulate sources on a continuous basis. Resp.'s Br. at 33 n. 5. As we have recognized, a passing mention of an otherwise unbriefed issue does not normally suffice to preserve the issue. *United States v. Haldeman*, 559 F.2d 31, 78 n. 113 (D.C.Cir.1976).[3]

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[3] The majority attempts to shoehorn its holding into Sierra Club's "continuous basis" arguments, stating that it reads § 112 and § 302(k) together to "require[ ] that there must be continuous section 112-compliant standards." Maj. Op. at 1027. But the discussion of § 302(k)'s "continuous basis" requirement does no work in the majority's legal analysis; without the "continuous

Though there have been exceptions, we have generally declined to consider issues not briefed by the parties, especially when the issue is not easy or the record is long and complex, *cf. United States v. Pryce*, 938 F.2d 1343, 1347-48, 1351 (D.C.Cir.1991), when doing so would be unfair to the respondent, *Envtl. Def. Fund, Inc. v. Costle*, 657 F.2d 275, 284 n. 32 (D.C.Cir.1981), or when the legal issue is particularly important, *Carducci v. Regan*, 714 F.2d 171, 177 (D.C.Cir.1983). Here, the question whether EPA's interpretation of § 112 is permissible is a difficult one, and both the record and the statute are complex. Here too, EPA has never had a fair opportunity to address the issue.

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basis" requirement, the majority would still hold that EPA's standards must be "section 112-compliant." The majority's point is not that EPA has failed to regulate emissions sources on a continuous basis. *See* Maj. Op. at 1027 (stating that EPA need not continuously apply a uniform standard). It is instead that the 1994 rule's "general duty to minimize" does not meet the requirements of § 112(h). Maj. Op. at 1027-28.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Filed July 30, 2009]

No. 02-1135
September Term 2008
EPA-67FR16582

SIERRA CLUB,
Petitioner

v.

ENVIRONMENTAL PROTECTION AGENCY and
LISA PEREZ JACKSON, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY,
Respondents

AMERICAN CHEMISTRY COUNCIL, *et al.*,
Intervenors

Consolidated with 03-1219, 06-1215, 07-1201

BEFORE: ROGERS and TATEL, *Circuit Judges*, and RANDOLPH*, *Senior Circuit Judge*

ORDER

Upon consideration of the petition of intervenor American Chemistry Council, et al. for panel rehearing filed on April 3, 2009, and the response thereto, it is

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*Senior Circuit Judge Randolph would grant the petition.

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Filed July 30, 2009]

No. 02-1135
September Term 2008
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SIERRA CLUB,
Petitioner

v.

ENVIRONMENTAL PROTECTION AGENCY and
LISA PEREZ JACKSON, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY,
Respondents

AMERICAN CHEMISTRY COUNCIL, *et al.*,
Intervenors

Consolidated with 03-1219, 06-1215, 07-1201

BEFORE: SENTELLE,* *Chief Judge*, and GINSBURG, HENDERSON,* ROGERS, TATEL, GARLAND, BROWN,* GRIFFITH, and KAVANAUGH,** *Circuit Judges*

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* Chief Judge Sentelle and Circuit Judges Henderson and Brown would grant the petitions.

** Circuit Judge Kavanaugh did not participate in this matter.

ORDER

The petitions of intervenors National Environmental Development Association's Clean Air Regulatory Project and American Chemistry Council, et al. for rehearing en banc and the responses thereto were circulated to the full court, and a vote was requested. Thereafter, a majority of the judges eligible to participate did not vote in favor of the petition. Upon consideration of the foregoing, it is

ORDERED that the petitions be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

APPENDIX D

STATUTES AND REGULATIONS

42 U.S.C. § 7412. Hazardous air pollutants

* * * *

(d) Emission standards

(1) In general

The Administrator shall promulgate regulations establishing emission standards for each category or subcategory of major sources and area sources of hazardous air pollutants listed for regulation pursuant to subsection (c) of this section in accordance with the schedules provided in subsections (c) and (e) of this section. The Administrator may distinguish among classes, types, and sizes of sources within a category or subcategory in establishing such standards except that, there shall be no delay in the compliance date for any standard applicable to any source under subsection (i) of this section as the result of the authority provided by this sentence.

(2) Standards and methods

Emissions standards promulgated under this subsection and applicable to new or existing sources of hazardous air pollutants shall require the maximum degree of reduction in emissions of the hazardous air pollutants subject to this section (including a prohibition on such emissions, where achievable) that the Administrator, taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impacts and energy requirements, determines is achievable for new or existing sources in the category or subcategory to which such emission standard applies, through application of measures,

processes, methods, systems or techniques including, but not limited to, measures which—

(A) reduce the volume of, or eliminate emissions of, such pollutants through process changes, substitution of materials or other modifications,

(B) enclose systems or processes to eliminate emissions,

(C) collect, capture or treat such pollutants when released from a process, stack, storage or fugitive emissions point,

(D) are design, equipment, work practice, or operational standards (including requirements for operator training or certification) as provided in subsection (h) of this section, or

(E) are a combination of the above.

None of the measures described in subparagraphs (A) through (D) shall, consistent with the provisions of section 7414(c) of this title, in any way compromise any United States patent or United States trademark right, or any confidential business information, or any trade secret or any other intellectual property right.

(3) New and existing sources

The maximum degree of reduction in emissions that is deemed achievable for new sources in a category or subcategory shall not be less stringent than the emission control that is achieved in practice by the best controlled similar source, as determined by the Administrator. Emission standards promulgated under this subsection for existing sources in a category or subcategory may be less stringent than standards for new sources in the same category or

subcategory but shall not be less stringent, and may be more stringent than—

(A) the average emission limitation achieved by the best performing 12 percent of the existing sources (for which the Administrator has emissions information), excluding those sources that have, within 18 months before the emission standard is proposed or within 30 months before such standard is promulgated, whichever is later, first achieved a level of emission rate or emission reduction which complies, or would comply if the source is not subject to such standard, with the lowest achievable emission rate (as defined by section 7501 of this title) applicable to the source category and prevailing at the time, in the category or subcategory for categories and subcategories with 30 or more sources, or

(B) the average emission limitation achieved by the best performing 5 sources (for which the Administrator has or could reasonably obtain emissions information) in the category or subcategory for categories or subcategories with fewer than 30 sources.

(4) Health threshold

With respect to pollutants for which a health threshold has been established, the Administrator may consider such threshold level, with an ample margin of safety, when establishing emission standards under this subsection.

(5) Alternative standard for area sources

With respect only to categories and subcategories of area sources listed pursuant to subsection (c) of this section, the Administrator may, in lieu of the

authorities provided in paragraph (2) and subsection (f) of this section, elect to promulgate standards or requirements applicable to sources in such categories or subcategories which provide for the use of generally available control technologies or management practices by such sources to reduce emissions of hazardous air pollutants.

(6) Review and revision

The Administrator shall review, and revise as necessary (taking into account developments in practices, processes, and control technologies), emission standards promulgated under this section no less often than every 8 years.

(7) Other requirements preserved

No emission standard or other requirement promulgated under this section shall be interpreted, construed or applied to diminish or replace the requirements of a more stringent emission limitation or other applicable requirement established pursuant to section 7411 of this title, part C or D of this subchapter, or other authority of this chapter or a standard issued under State authority.

(8) Coke ovens

(A) Not later than December 31, 1992, the Administrator shall promulgate regulations establishing emission standards under paragraphs (2) and (3) of this subsection for coke oven batteries. In establishing such standards, the Administrator shall evaluate—

(i) the use of sodium silicate (or equivalent) luting compounds to prevent door leaks, and other operating practices and technologies for their effectiveness in reducing coke oven emissions, and their suitability for use on new

and existing coke oven batteries, taking into account costs and reasonable commercial door warranties; and

(ii) as a basis for emission standards under this subsection for new coke oven batteries that begin construction after the date of proposal of such standards, the Jewell design Thompson non-recovery coke oven batteries and other non-recovery coke oven technologies, and other appropriate emission control and coke production technologies, as to their effectiveness in reducing coke oven emissions and their capability for production of steel quality coke.

Such regulations shall require at a minimum that coke oven batteries will not exceed 8 per centum leaking doors, 1 per centum leaking lids, 5 per centum leaking offtakes, and 16 seconds visible emissions per charge, with no exclusion for emissions during the period after the closing of self-sealing oven doors. Notwithstanding subsection (i) of this section, the compliance date for such emission standards for existing coke oven batteries shall be December 31, 1995.

(B) The Administrator shall promulgate work practice regulations under this subsection for coke oven batteries requiring, as appropriate—

(i) the use of sodium silicate (or equivalent) luting compounds, if the Administrator determines that use of sodium silicate is an effective means of emissions control and is achievable, taking into account costs and reasonable commercial warranties for doors and related equipment; and

(ii) door and jam cleaning practices.

Notwithstanding subsection (i) of this section, the compliance date for such work practice regulations for coke oven batteries shall be not later than the date 3 years after November 15, 1990.

(C) For coke oven batteries electing to qualify for an extension of the compliance date for standards promulgated under subsection (f) of this section in accordance with subsection (i)(8) of this section, the emission standards under this subsection for coke oven batteries shall require that coke oven batteries not exceed 8 per centum leaking doors, 1 per centum leaking lids, 5 per centum leaking offtakes, and 16 seconds visible emissions per charge, with no exclusion for emissions during the period after the closing of self-sealing doors. Notwithstanding subsection (i) of this section, the compliance date for such emission standards for existing coke oven batteries seeking an extension shall be not later than the date 3 years after November 15, 1990.

(9) Sources licensed by the Nuclear Regulatory Commission

No standard for radionuclide emissions from any category or subcategory of facilities licensed by the Nuclear Regulatory Commission (or an Agreement State) is required to be promulgated under this section if the Administrator determines, by rule, and after consultation with the Nuclear Regulatory Commission, that the regulatory program established by the Nuclear Regulatory Commission pursuant to the Atomic Energy Act [42 U.S.C. § 2011 *et seq.*] for such category or subcategory provides an ample margin of safety to protect the public health. Nothing in this subsection shall preclude or deny the right of any State or political subdivision thereof to adopt or

enforce any standard or limitation respecting emissions of radionuclides which is more stringent than the standard or limitation in effect under section 7411 of this title or this section.

(10) Effective date

Emission standards or other regulations promulgated under this subsection shall be effective upon promulgation.

* * * *

42 U.S.C. § 7602. Definitions

When used in this chapter—

* * * *

(k) The terms "emission limitation" and "emission standard" mean a requirement established by the State or the Administrator which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction, and any design, equipment, work practice or operational standard promulgated under this chapter.[1]

* * * *

42 U.S.C. § 7607. Administrative proceedings and judicial review

* * * *

(b) Judicial review

(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 7412 of this

[1] So in original.

title, any standard of performance or requirement under section 7411 of this title, any standard under section 7521 of this title (other than a standard required to be prescribed under section 7521(b)(1) of this title), any determination under section 7521(b)(5) of this title, any control or prohibition under section 7545 of this title, any standard under section 7571 of this title, any rule issued under section 7413, 7419, or under section 7420 of this title, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 7410 of this title or section 7411(d) of this title, any order under section 7411(j) of this title, under section 7412 of this title,[2] under section 7419 of this title, or under section 7420 of this title, or his action under section 1857c-10(c)(2)(A), (B), or (C) of this title (as in effect before August 7, 1977) or under regulations thereunder, or revising regulations for enhanced monitoring and compliance certification programs under section 7414(a)(3) of this title, or any other final action of the Administrator under this chapter (including any denial or disapproval by the Administrator under subchapter I of this chapter) which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator

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[2] So in original.

finds and publishes that such action is based on such a determination. Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise. The filing of a petition for reconsideration by the Administrator of any otherwise final rule or action shall not affect the finality of such rule or action for purposes of judicial review nor extend the time within which a petition for judicial review of such rule or action under this section may be filed, and shall not postpone the effectiveness of such rule or action.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement. Where a final decision by the Administrator defers performance of any nondiscretionary statutory action to a later time, any person may challenge the deferral pursuant to paragraph (1).

* * * *

40 C.F.R. § 63.6. Compliance with standards and maintenance requirements.

* * * *

(e) Operation and maintenance requirements.

(1)(i) At all times, including periods of startup, shutdown, and malfunction, the owner or operator must operate and maintain any affected source, including associated air pollution control equipment and monitoring equipment, in a manner consistent with

safety and good air pollution control practices for minimizing emissions. During a period of startup, shutdown, or malfunction, this general duty to minimize emissions requires that the owner or operator reduce emissions from the affected source to the greatest extent which is consistent with safety and good air pollution control practices. The general duty to minimize emissions during a period of startup, shutdown, or malfunction does not require the owner or operator to achieve emission levels that would be required by the applicable standard at other times if this is not consistent with safety and good air pollution control practices, nor does it require the owner or operator to make any further efforts to reduce emissions if levels required by the applicable standard have been achieved. Determination of whether such operation and maintenance procedures are being used will be based on information available to the Administrator which may include, but is not limited to, monitoring results, review of operation and maintenance procedures (including the startup, shutdown, and malfunction plan required in paragraph (e)(3) of this section), review of operation and maintenance records, and inspection of the source.

* * * *

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(3)

Supreme Court, U.S.
FILED
JAN 27 2010
OFFICE OF THE CLERK

No. 09-495

In the Supreme Court of the United States

AMERICAN CHEMISTRY COUNCIL, ET AL.,
PETITIONERS

v.

SIERRA CLUB, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether a petitioner may challenge a Clean Air Act regulation after expiration of the Act's 60-day time period for judicial review, 42 U.S.C. 7607(b)(1) (Supp. I 2007), on the ground that the regulatory context of the regulation has changed sufficiently to alter the stakes for judicial review.

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In the Supreme Court of the United States

No. 09-495

AMERICAN CHEMISTRY COUNCIL, ET AL.,
PETITIONERS

v.

SIERRA CLUB, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 551 F.3d 1019.

JURISDICTION

The judgment of the court of appeals was entered on December 19, 2008. Petitions for rehearing were denied on July 30, 2009 (Pet. App. 22a-23a, 24a-25a). The petition for a writ of certiorari was filed on October 22, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Environmental Protection Agency (EPA) regulates the emission of hazardous pollutants into the air

through National Emission Standards for Hazardous Air Pollutants (NESHAPs), which are promulgated under Section 112 of the Clean Air Act (CAA), 42 U.S.C. 7412. Section 112 lists numerous "hazardous air pollutants," 42 U.S.C. 7412(b)(1), and it authorizes EPA to add to the list other pollutants that "present, or may present, through inhalation or other routes of exposure, a threat of adverse human health effects," 42 U.S.C. 7412(b)(2). The CAA requires EPA to enumerate "all categories and subcategories" of sources of the listed pollutants and then to revise that list periodically. 42 U.S.C. 7412(c)(1).

Based on the list of pollutants and the list of categories and subcategories of sources that emit them, EPA must "establish[] emission standards" for each source category and subcategory. 42 U.S.C. 7412(d)(1). For major sources, those technology-based standards, known as maximum achievable control technology (MACT) standards, must

> require the maximum degree of reduction in emissions of the hazardous air pollutants subject to this section * * * that the Administrator, taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impacts and energy requirements, determines is achievable for new or existing sources in the category or subcategory to which such emission standard applies, through application of measures, processes, methods, systems or techniques.

42 U.S.C. 7412(d)(2). Under the CAA, MACT standards for new major sources may permit no greater emissions than those released "in practice by the best controlled similar source," while MACT standards for existing major sources in large categories and subcategories must

allow for release of no greater emissions than the average of the "best performing 12 percent of the existing sources." 42 U.S.C. 7412(d)(3). This provision is commonly called the "MACT floor."

The CAA provides a mechanism for judicial review of emissions standards and other actions taken by EPA to implement the statute. 42 U.S.C. 7607(b) (Supp. I 2007). The CAA states that a "petition for review of action of the [EPA] in promulgating * * * any emission standard or requirement under [Section 112] * * * may be filed only in the United States Court of Appeals for the District of Columbia." 42 U.S.C. 7607(b)(1) (Supp. I 2007). A petition for review

> shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise.

Ibid.

2. In March 1994, EPA adopted a set of "General Provisions" that, under the terms of the regulation, need not be repeated in every separate emission standard. See 59 Fed. Reg. 12,408 (1994 Rule). Instead, EPA specifies in its category- and subcategory-specific emissions standards which of these General Provisions "is or is not included in such relevant standard." 40 C.F.R. 63.1(a)(4).

This case involves one of these General Provisions. The relevant General Provision states that, during periods of startup, shutdown, and malfunction (SSM), covered sources (*i.e.*, sources subject to emissions standards in which EPA has incorporated this General Provision)

are exempt from the category-specific emissions limitations that apply during normal operating conditions. 40 C.F.R. 63.6(f)(1) and (h)(1). No party challenged the SSM exemption within 60 days after it was published in the *Federal Register*.

A separate, but related, General Provision also established in 1994 requires sources at all times to operate "in a manner consistent with safety and good air pollution control practices for minimizing emissions." 40 C.F.R. 63.6(e)(1)(i). This duty to minimize emissions applies during normal operating conditions as well as during SSM events, and it requires the source to reduce its emissions "to the greatest extent which is consistent with safety and good air pollution control practices." *Ibid.* However, this "general duty to minimize emissions during a period of startup, shutdown, or malfunction does not require the owner or operator to achieve emission levels that would be required by the applicable standard at other times." *Ibid.*

The General Provisions also require each source to develop a plan that "describes, in detail, procedures for operating and maintaining the source during periods of startup, shutdown, and malfunction; and a program of corrective action for malfunctioning process, air pollution control, and monitoring equipment used to comply with the relevant standard." 40 C.F.R. 63.6(e)(3)(i). Sources must maintain current SSM plans and make them available for inspection by the permitting authority, and the permitting authority may request a copy of the SSM plan at any time. 40 C.F.R. 63.6(e)(3)(v). Sources may periodically revise their SSM plans, and the permitting authority may order revisions. 40 C.F.R. 63.6(e)(3)(vii). Sources must also report any malfunction and keep records of actions taken to mini-

mize emissions when malfunctions occur. Sources must also report any actions taken to minimize emissions during startup and shutdown if the source's emissions exceed the standard that would apply during normal operations. 40 C.F.R. 63.6(e)(3)(iii) and (iv); see 40 C.F.R. 63.10(b)(2)(iv) and (v), 63.10(d)(5)(i) and (ii).

3. EPA subsequently amended some of the SSM-related rules, but it did not amend the SSM exemption itself.

Title V of the Clean Air Act requires sources to have permits embodying the relevant emissions limitations. 42 U.S.C. 7661a(a). As originally promulgated in 1994, the General Provisions required that a source's SSM plan be "incorporated by reference into the source's title V permit." 40 C.F.R. 63.6(e)(3)(i) (1994). At the time of promulgation, industry groups (but not environmental groups) challenged this provision of the 1994 rules, arguing, *inter alia*, that the requirement to incorporate the SSM plan into the source's Title V permit could require a permit revision any time the SSM plan was revised. Because EPA agreed that such a result would be unduly burdensome, EPA amended the General Provisions in 2002 to remove the requirement that the SSM plan be incorporated into the source's Title V permit. 67 Fed. Reg. 16,587. Nonetheless, sources remained obligated to develop an SSM plan and then operate in accordance with it. *Ibid.* At the same time, EPA also removed the requirement that sources routinely submit their SSM plans to the permitting authority, and it required permitting authorities to obtain an SSM plan and make it publicly available only if asked to do so by a member of the public. *Id.* at 16,600; see 66 Fed. Reg. 16,326 (2001) (proposing rule change). In 2003, EPA further modified the rules to specify that any request by a member of the pub-

lic that EPA or a permitting authority obtain a copy of a source's SSM plan (in order to make it publicly available) must be "specific and reasonable." 68 Fed. Reg. 32,591.

In 2006, EPA rescinded the requirement that sources follow their SSM plans during SSM events on the ground that this would "allow sources flexibility to address emissions during periods of SSM." 71 Fed. Reg. 20,447. The agency also rescinded the requirement that EPA or the permitting authority obtain a copy of the SSM plan after a request from the public, although it stated its expectation that most permitting authorities would continue to do so voluntarily upon "reasonable" request. *Id.* at 20,451. In the same rulemaking action, EPA noted that some commenters had suggested eliminating the SSM exemption altogether, but it explained that this exemption had been in place since 1994 and that these comments were "outside of the scope of this rulemaking." *Id.* at 20,449.

Petitions for review challenging these various post-1994 rule changes (and an additional denial of reconsideration in 2007, 72 Fed. Reg. 19,385) were filed by various environmental groups (collectively Sierra Club). Those groups are the private respondents in this Court. Those petitions for review were consolidated by the court of appeals.

4. Although Sierra Club raised subsidiary challenges to the changes EPA made between 2002 and 2006 to the SSM plan rules, its principal challenge in the court of appeals was to the SSM exemption itself. Sierra Club argued that the text of Section 112 does not permit such an exemption. The court of appeals granted the petitions for review and vacated the SSM exemption. Pet. App. 1a-21a.

a. Although the petitions for review were filed more than 60 days after the SSM exemption was promulgated in 1994, the court of appeals held that the petitions were timely. Pet. App. 8a-13a. The court noted that under D.C. Circuit precedent, an agency can "reopen" an unchanged rule—and thus create a new window for judicial review of it—if the agency puts the rule out for comment, offers a renewed justification for it, and then responds to comments when "promulgating the regulation in its final form." *Id.* at 8a (quoting *American Iron & Steel Inst.* v. *EPA*, 886 F.2d 390, 397 (1989), cert. denied, 497 U.S. 1003 (1990)). The court acknowledged, however, that those circumstances were not present in this case because EPA had stated during the 2006 rulemaking that comments on the propriety of the SSM exemption were beyond the scope of the proceeding. *Id.* at 9a (citing 71 Fed. Reg. at 20,449). "Such agency conduct," the court of appeals recognized, "is not tantamount to an *actual* reopening." *Ibid.*

The court of appeals held, however, that EPA had "constructively reopen[ed]" the SSM exemption to judicial review when the agency altered "the regulatory context for its SSM exemption by stripping out virtually all of the SSM plan requirements that it created to contain that exemption." Pet. App. 9a (internal quotation marks omitted). The court saw these actions as effectively leaving only the "general duty" to minimize emissions, 40 C.F.R. 63.6(e)(1)(i), in place during SSM events. Pet. App. 10a-11a. The court explained that from "the perspective of environmental petitioners' interests and allocation of resources the general duty 'may not have been worth challenging in [1994], but the [revised] regulations gave [that duty] a new significance.'" *Id.* at 11a (quoting *Kennecott Utah Copper Corp.* v. *Department of the Inte-*

rior, 88 F.3d 1191, 1227 (D.C. Cir. 1996). The court of appeals concluded that the post-1994 modifications to the regulatory framework "changed the calculus for petitioners in seeking judicial review, and thereby constructively reopened consideration of the exemption from section 112 emission standards during SSM events." *Id.* at 12a-13a (citation omitted).

b. On the merits, the court of appeals found that CAA Sections 112 and 302(k) require not only continuous emission standards, but emission standards that are continuously in compliance with CAA Section 112(d)'s minimum levels of stringency. Pet. App. 15a. The court concluded that because the general duty to minimize emissions is the only standard that applies during SSM events, and the general duty standing alone does not comply with Section 112(d), "the SSM exemption violates the CAA's requirement that some section 112 standard apply continuously." *Ibid.* The court therefore vacated the exemption and did not reach Sierra Club's other arguments. *Id.* at 17a.

c. Judge Randolph dissented. Pet. App. 18a-21a. He agreed with the panel majority that an agency can reopen a prior regulation, thereby giving interested parties a new 60-day window for seeking judicial review, if the agency "give[s] its regulation new significance by altering other regulations incorporating it by reference." *Id.* at 18a. In the dissenting judge's view, however, "nothing of the sort occurred here." *Ibid.* Judge Randolph concluded that even if EPA's amendments to the regulatory regime had made it more difficult to enforce the general duty to minimize emissions, "that could hardly have amounted to agency 'action' re-promulgating the 1994 regulations." *Id.* at 18a-19a.

ARGUMENT

Although the court of appeals erred in invoking the "constructive reopening" doctrine to find Sierra Club's attack on a 1994 regulation timely, the petition should be denied. This little-used D.C. Circuit doctrine has not posed a significant problem in agency review cases, and there is no division among the circuits concerning its proper application. Moreover, EPA is already taking significant steps—with input from industry and other interested parties—to minimize any disruption that might flow from the court of appeals' decision.

1. Although agency regulations often are not ripe for judicial review until they are applied to specific factual settings, some federal statutes authorize review of particular categories of regulations immediately upon their promulgation. See *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 891 (1990). The CAA provides for review in the D.C. Circuit of various categories of EPA actions, including the promulgation of "any emission standard or requirement." 42 U.S.C. 7607(b)(1) (Supp. I 2007). "Any petition for review under [the CAA] shall be filed within sixty days from the date notice of such promulgation, approval, or action appears" in the *Federal Register*. *Ibid.* In applying the 60-day filing requirement, the D.C. Circuit has held that, even when an agency leaves a pre-existing rule in place, the agency may actually reopen the rule to judicial review by seeking comment on the rule, responding to comments, and offering a renewed explanation of the rule. See, *e.g.*, *National Mining Ass'n* v. *Department of the Interior*, 70 F.3d 1345, 1352 (1995) (agency reopens rule when it "undertake[s] a serious, substantive reconsideration" of it). In such situations, the court has concluded that the agency's course of con-

duct should be treated as an effective repromulgation of the rule that triggers a new 60-day review period.

This case involves what the D.C. Circuit has described as "one extension of that rule" of actual reopening. *Kennecott Utah Copper Corp.* v. *Department of the Interior*, 88 F.3d 1191, 1214 (1996) (*Kennecott Copper*). This "extension" "covers a possible circumstance in which an issue might be deemed to have been constructively reopened even though it was not actually reopened." *Ibid.* When an agency does not actually reopen a settled rule, but makes changes to related rules that the court believes "changed the calculus for petitioners in seeking judicial review," the court may deem the agency to have "constructively reopened" the settled rule to judicial review. Pet. App. 12a.

To this point, the D.C. Circuit's rarely-used constructive reopening rule has not posed a substantial problem for the government in agency review cases. We are aware of only two decisions (other than the one at issue here) in which that court found constructive reopening. See *National Ass'n of Mfrs.* v. *Department of the Interior*, 134 F.3d 1095, 1104 (1998); *Kennecott Copper*, 88 F.3d at 1214.[1] In *Kennecott Copper*, the first D.C. Circuit case to discuss "constructive reopening," the court found the doctrine applicable to only one of the several claims at issue. See *id.* at 1214-1215. The court in *Kennecott Copper* also stressed that "the appropriate

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[1] In a handful of other cases, the D.C. Circuit considered and rejected, or found it unnecessary to reach, a party's claim that an agency had constructively reopened a rule. See, *e.g.*, *PanAmSat Corp.* v. *FCC*, 198 F.3d 890, 894 (1999) (finding it unnecessary to decide whether constructive reopening had occurred because agency had expressly held question open in earlier order); *Environmental Def.* v. *EPA*, 467 F.3d 1329, 1333-1334 (2006) (finding no constructive reopening).

way in which to challenge a longstanding regulation on the ground that it is 'violative of statute' is ordinarily 'by filing a petition for amendment or rescission of the agency's regulations, and challenging the denial of that petition.'" *Id.* at 1214 (quoting *Public Citizen* v. *Nuclear Regulatory Comm'n*, 901 F.2d 147, 152 (D.C. Cir. 1990), cert. denied, 498 U.S. 992 (1990)).

There is no reason to suppose that the decision below heralds a dramatic expansion of the "constructive reopening" doctrine within the D.C. Circuit. The court of appeals' decision in *NRDC* v. *EPA*, 571 F.3d 1245 (2009), issued after the court's ruling in this case, confirms the limited contours of the D.C. Circuit's "constructive reopening" doctrine. In *NRDC*, the D.C. Circuit interpreted *Kennecott Copper* and the decision at issue here to permit a finding of constructive reopening only when the agency "work[s] * * * a sea change" in the regulatory landscape surrounding an unchanged rule. *Id.* at 1266. Applying that stringent standard, the court found no reopening. See *ibid.*[2]

As we explain below (see pp. 16-18, *infra*), we agree with petitioners that the court of appeals erred in treating as timely Sierra Club's request for review of the SSM exemption that was promulgated in 1994. In endorsing the concept of "constructive reopening," however, the court of appeals invoked a doctrine that has been part of D.C. Circuit case law for nearly 15 years and that has had an insubstantial impact on agency practice during that period. Given the infrequency with which the D.C.

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[2] Judge Rogers, the author of the court of appeals' opinion in this case, dissented in *NRDC*. 571 F.3d at 1277. She would have found constructive reopening on the facts presented in *NRDC*, and she criticized the majority's approach for being so strict as to "render the constructive reopening precedents nugatory." *Id.* at 1278.

Circuit has found constructive reopening, and its recent decision in *NRDC* confirming that the doctrine applies only in limited circumstances, the Court's intervention is not warranted at this time.[3]

2. Contrary to petitioners' contention (Pet. 17-22), the circuits are not divided on the question presented by this case. No other court of appeals has addressed the question whether the time for seeking review of an agency regulation may be constructively reopened.

In the cases that petitioners cite, the courts of appeals have held that a party may obtain judicial review of even a long-established rule by petitioning the agency to amend or rescind it and then seeking judicial review if that petition is denied. See, *e.g.*, *Dunn-McCampbell Royalty Interest, Inc.* v. *National Park Serv.*, 112 F.3d 1283, 1287 (5th Cir. 1997); *Wind River Mining Corp.* v. *United States*, 946 F.2d 710, 716 (9th Cir. 1991); *Legal Envtl. Assistance Found.* v. *EPA*, 118 F.3d 1467, 1472-1473 (11th Cir. 1997). Denial of a petition opens a new period within which "to challenge * * * the agency's constitutional or statutory authority." *Dunn*, 112 F.3d at 1287. The D.C. Circuit likewise recognizes that such a procedure provides the normal route to judicial review of a rule for which the statutory deadline has expired. See

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[3] In their briefs to the panel, both petitioners and the government contended that no constructive reopening had occurred in this case under the standards set forth in prior D.C. Circuit decisions. After the panel issued its opinion, petitioners (but not the government) filed a petition for rehearing en banc. In that filing, petitioners contended that the panel's application of the "constructive reopening" doctrine conflicted with prior D.C. Circuit decisions. Petitioners did not argue that the court of appeals should reject the concept of constructive reopening altogether. Petitioners have advanced that argument for the first time in this Court.

Kennecott Copper, 88 F.3d at 1214 (describing this as the "ordinar[y]" way of obtaining review).[4]

In holding that constructive reopening provides an additional (though infrequently available) means of securing judicial review of an agency rule, the D.C. Circuit has not departed from the decisions of other courts of appeals, but has simply resolved a question that no other circuit has decided. No other court of appeals has specifically rejected the concept of constructive reopening or held that seeking review of the denial of a petition to rescind is the exclusive means of securing review of an old rule. There is no circuit split.[5]

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[4] In a decision released after the one at issue here, the D.C. Circuit reiterated that "agency denial of a petition for a new rulemaking which complains of *substantive* infirmities in existing rules *is*, for the most part, judicially reviewable irrespective of time limits dating from the rules' enactment." *American Road & Transp. Builders Ass'n* v. *EPA*, 588 F.3d 1109, 1112 (2009). The court went on to hold, however, that in a CAA case, this procedure could not be used to "raise points that could have been brought to [the court's] attention" when the rule was first promulgated. *Id.* at 1113. That is because the CAA's judicial-review provision specifically addresses challenges filed after the initial 60-day deadline expires, authorizing the court to entertain such challenges only when they are "'based solely on grounds arising after'" the deadline. *Id.* at 1112 (quoting 42 U.S.C. 7607(b)(1) (Supp. I 2007)).

[5] Petitioners' claim (Pet. 21) of an "intra-circuit conflict" is likewise incorrect. In *Oljato Chapter of Navajo Tribe* v. *Train*, 515 F.2d 654, 666 (1975), the D.C. Circuit recognized that, in cases where new information is alleged to cast doubt on the reasonableness of an existing EPA regulation, allowing judicial review of EPA's "refusal to revise" the agency rule in light of the new information is "considerably more desirable" than permitting "direct review of a new information challenge." The court in that case had no occasion, however, to decide whether and under what circumstances EPA's amendment of related aspects of a regulatory regime might constitute constructive reopening of unchanged portions of a pre-existing rule.

3. Although the question presented in the petition for a writ of certiorari does not encompass any challenge to the court of appeals' holding on the merits (see Pet. i), petitioners contend that the court's vacatur of the challenged SSM exemption will lead to "practical consequences so stark that they warrant review." Pet. 23; see Pet. 22-25. Petitioners greatly overstate the likely impact of the court of appeals' holding.

First, the court of appeals' decision directly applies only to a minority of EPA's Section 112(d) standards. Most of those standards do not simply rely on cross-references to the general rules that were vacated by the court below, but rather include "specific regulatory text that exempts or excuses compliance during SSM events." See Letter from Adam M. Kushner, Director, Office of Civil Enforcement, to counsel, 2, Tbl. 1 and 2 (July 22, 2009) (explaining EPA's view that the decision below applies directly to only 35 of 99 standards) <http://www.epa.gov/compliance/civil/caa/ssm-memo080409.pdf> (Kushner Letter); 74 Fed. Reg. 43,124 (2009) (notifying public of availability of Kushner letter, which "addresses concerns that have been raised regarding the impact of the decision in [this case]"). Those standard-specific SSM exemptions were not before the court below and therefore remain in force. To the extent the court's decision may raise questions about the validity of those standards, "EPA intends to evaluate each of them in light of the court's decision." Kushner Letter 2-3.

Second, with respect to most of the standards that relied on only cross-references to the general SSM exemption, EPA's initial analysis indicates that for "various reasons" the decision below should raise no significant "compliance issues." Kushner Letter 3. For example, some sources use "pollution control equipment [that] is

not affected by SSM events," and some standards impose work practice requirements that can be met during SSM events. In addition, some standards are expressed over such long periods of time (such as an annual rolling average) that deviation from normal emissions levels during SSM events is unlikely to have a material impact on regulated entities' ability to achieve compliance. *Ibid.*

That leaves the minority of the minority of EPA's Section 112(d) standards—*i.e.*, those that rely solely on a cross-reference to the general SSM exemptions and that cover sources for which the lack of such an exemption is likely to have a material impact on regulated parties' ability to satisfy the standards. EPA announced in July 2009 that, in light of the decision below, the agency was "evaluating * * * which Section 112(d) source category standards should be revised, and of these, which should be revised on an expedited basis." Kushner Letter 4. As part of that process, EPA explained that it "intend[ed] to give highest priority to reviewing and revising those Section 112(d) source category standards that may be difficult for sources to meet during an SSM period given the technological limitations of the process involved." *Ibid.*

After receiving comments from industry and other interested parties, EPA recently promulgated Section 112 rules that treat SSM events in a manner consistent with the court of appeals' holding. For example, in issuing a new Section 112(d) standard for chemical manufacturing area sources, EPA "established different standards for [startup and shutdown] periods where appropriate." National Emission Standards for Hazardous Air Pollutants for Chemical Manufacturing Area Sources, 74 Fed. Reg. 56,033 (2009); see also National Emission Standards for Hazardous Air Pollutants for Area Sourc-

es: Asphalt Processing and Asphalt Roofing Manufacturing, 74 Fed. Reg. 63,250-63,251 (2009) (measuring compliance over 24 hours "during periods of startup and shutdown" and over three hours at other times); Pet. App. 14a (court of appeals holds that EPA must apply a Section 112(d) standard at all times "without necessarily continuously applying a single standard").

Finally, EPA has spoken directly to its use of enforcement discretion during the period before it updates remaining emissions standards to address SSM events. EPA has explained that where "a source * * * fails to comply with the applicable Section 112(d) standards during SSM events, EPA will determine an appropriate response based on, among other things, the good faith efforts of the source to minimize emissions during SSM periods." Kushner Letter 3. EPA has also encouraged "sources that anticipate compliance difficulties to contact EPA or the appropriate state regulatory authority" since "EPA or the state may be able to take action to resolve a source's compliance concerns by, for example, issuing an Administrative Order on Consent." *Id.* at 4. To facilitate that process, EPA sought and obtained from the court of appeals a 60-day stay of the issuance of the court's mandate. See EPA Mot. to Stay Mandate, *Sierra Club* v. *EPA*, No. 02-1135 (D.C. Cir. filed Aug. 5, 2009); Order (Sept. 23, 2009) (No. 02-1135) (granting motion). Given that the court of appeals' decision impacts only a minority of EPA's Section 112 standards, and in light of the steps EPA is taking to address these impacts, review by this Court is not warranted.

4. Although this Court's review is unwarranted for the reasons discussed above, the government believes that the court of appeals erred in treating as timely Sierra Club's challenge to the 1994 SSM exemption. Un-

der the CAA's judicial-review provision, a petition for review challenging an "emission standard or requirement" promulgated under Section 112 of the CAA must be filed within 60 days after "the date notice of such * * * action appears" in the *Federal Register*. 42 U.S.C. 7607(b)(1) (Supp. I 2007). In this case, however, the court of appeals reviewed an "action" from 1994 in response to petitions for review filed within 60 days of *Federal Register* notices of separate regulatory "action[s]" taken by EPA between 2002 and 2006.

The CAA's requirement that a petition for review of an EPA regulation must be filed within 60 days after promulgation of *that* regulation is easy to administer and promotes certainty about which agency rules are and are not subject to challenge. Allowing judicial review after that initial 60-day window under the "actual reopening" rule—*i.e.*, when EPA has expressly reconsidered and then effectively readopted a regulation—is unlikely to reduce that certainty to an appreciable degree.

The "constructive reopening" doctrine as applied in this case has some hypothetical potential to cause confusion because the mode of analysis used by the court below is less determinate than the standard for determining whether actual reopening has occurred. Both in a conventional challenge to an EPA rule filed immediately upon its promulgation and in a later challenge filed after an "actual reopening" of the rule, the timeliness of a petition for review turns exclusively on the agency's actions. The constructive reopening rule, by contrast, allows or disallows judicial review depending on the court's assessment of an outside party's reaction to the agency's actions. Thus, in theory, the D.C. Circuit's adoption of the "constructive reopening" doctrine in *Kennecott Copper* might have resulted in litigation and uncertainty as to

the timeliness of various challenges to agency regulations made reviewable by statute.

As we explain, however, those consequences have never in fact occurred. Since the 1996 decision in *Kennecott Copper*, plaintiffs have rarely invoked the "constructive reopening" doctrine, and the D.C. Circuit has even more rarely found that a constructive reopening has been established. Petitioners offer no sound reason to believe that the court will apply the doctrine more expansively in the future, and the D.C. Circuit's subsequent decision in *NRDC* indicates that the court will continue to exercise restraint. See p. 11, *supra*. Because the practical significance of the question presented in the petition for certiorari is slight, and because EPA is taking appropriate steps to minimize any disruption that might be caused by the court of appeals' merits decision, review by this Court is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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(4)

No. 09-495

IN THE
Supreme Court of the United States

AMERICAN CHEMISTRY COUNCIL, ET AL.,
Petitioners

v.

SIERRA CLUB, ET AL.,
Respondents

On Petition for Writ of Certiorari
to the United States Court Of Appeals for the
District of Columbia Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented in the petition – although not raised by any party before the D.C. Circuit panel or in petitioners' request for en banc review, nor addressed by that court – is whether, consistent with the Clean Air Act's judicial review provisions, a regulatory provision adopted under the Act may be reopened for public comment and judicial review when the Environmental Protection Agency subsequently rescinds express limits on that provision's operation, thereby materially altering its operation and significantly increasing its adverse impacts on affected parties.

RULE 29.6 DISCLOSURE

Respondents Sierra Club, Friends of Hudson, Environmental Integrity Project, Louisiana Environmental Action Network, and Coalition For A Safe Environment neither have parent corporations nor have they issued shares to the public or any publicly held company.

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STATEMENT

In the decision below, the D.C. Circuit applied longstanding and unbroken precedent to find that the United States Environmental Protection Agency (EPA or "the agency") had reopened a sweeping regulatory exemption from Clean Air Act controls on emissions of hazardous air pollutants to renewed public comment and to judicial review under Clean Air Act § 307(b), 42 U.S.C. § 7607(b), by subsequently retracting inextricably linked regulatory requirements that EPA had promulgated for the express purpose of limiting that exemption. Pet. App. at 9a-13a. The Court then held that the exemption is contrary to the plain text of the Act. *Id.* at 13a-17a. EPA agreed below that the reopening decision was consistent with D.C. Circuit precedent (EPA Response to Reh'g Petition at 5), does not seek further review of the decision, and has already undertaken to correct the flaws identified by the Court's opinion (July 22, 2009 Letter to Counsel from Adam M. Kushner, Director, EPA Office of Civil Enforcement, available at http://www.epa.gov/compliance/civil/caa/ssm-memo080409.pdf ("EPA Letter") at 4).

Although EPA did not seek further review of the opinion, some of the industry groups who were intervenors below (collectively, "American Chemistry Council" or "ACC"), have petitioned for certiorari to advance an argument that no party raised, is contrary to the position they took in the proceedings below (including their unsuccessful petition for rehearing en banc), and that the D.C. Circuit has never addressed. Although ACC does not challenge

the D.C. Circuit's ruling that the disputed exemption was unlawful, or dispute that Clean Air Act regulatory provisions can be reopened for judicial review, ACC now argues that a regulatory provision can never be reopened by an agency's subsequent changes to interrelated regulatory provisions no matter how inextricably linked those provisions are. But because ACC does not dispute that Clean Air Act rules can be reopened for judicial review, and because decisions about whether any given rule has been reopened necessarily turn on case-specific, particularized analysis of the administrative record, ACC's new contention would not warrant review by this Court even if it had been raised and ruled upon in the D.C. Circuit. Moreover, contrary to ACC's claims, the decision below is fully consistent with D.C. Circuit precedent, does not conflict with any decision in any other court, and readily comports with the Clean Air Act's judicial review provisions. There is no basis for further review.

A. Administrative History

1. Section 112 Emission Standards For Air Toxics

Hazardous air pollutants, also known as "air toxics," are pollutants that can cause cancer and other serious adverse health effects. S. Rep. No. 228, 101st Cong., 1st Sess. 128 (1989). The air toxics provisions in the pre-1990 Clean Air Act (CAA or "the Act") relied largely on EPA discretion, and "worked poorly." *National Lime Ass'n v. EPA*, 233 F.3d 625, 634 (D.C. Cir. 2000). Accordingly, Congress completely rewrote § 112 in the 1990 Clean Air Act Amendments, "eliminating much of EPA's

discretion in the process." *New Jersey v. EPA*, 517 F.3d 574, 578 (D.C. Cir. 2008), *cert. dismissed* 129 S. Ct. 1313 (2009) and *cert. denied sub nom. Utility Air Regulatory Group v. New Jersey*, 129 S. Ct. 1308 (2009). Section 112 now requires EPA to set emission standards for each hazardous air pollutant that a regulated industry emits and precisely prescribes the stringency for these standards. *Sierra Club v. EPA*, 479 F.3d 875, 877 (D.C. Cir. 2007). Consistent with the special health risks associated with air toxics, the statute provides that standards to control emissions from new or existing sources "shall require the maximum degree of reduction in emissions" that the Administrator finds to be achievable for the source category in question, and may not be less stringent than the emission limitation actually achieved by the best performing sources. 42 U.S.C. § 7412(d)(2)-(3). The Act requires that all Clean Air Act emission standards apply "on a continuous basis." 42 U.S.C. § 7602(k). *See* Pet. App. at 2a-3a.

2. EPA's SSM Exemption

This case involves a broad administrative exemption from statutorily required hazardous air pollutant emission standards. During periods of startup, shutdown, or malfunction (SSM), the exemption at issue excused the operators of major sources of hazardous air pollutants from complying with § 112 emission standards and allowed them to comply instead with only a "general duty" to operate "in a manner consistent with safety and good air pollution control practices for minimizing emissions." 40 C.F.R. § 63.6(e)(1)(i).

When EPA established the SSM exemption in 1994, the agency recognized that allowing sources to comply only with the "general duty" during SSM events would create a "blanket exemption" from § 112 emission standards. Pet. App. at 4a. To prevent that outcome, EPA simultaneously promulgated a robust and detailed set of requirements for "SSM plans." *Id.* Contrary to ACC's claim (Pet. at 6), these were not mere recordkeeping requirements. Rather, the final rule expressly required each SSM plan to set out source-specific "procedures for operating and maintaining the source during periods of [SSM]" and a source-specific "program of corrective action for malfunctioning process and air pollution control equipment used to comply with the relevant standards." 40 C.F.R. § 63.6(e)(3)(i) (1994), C.A. JA927. Source operators had to comply with their plans during SSM events, and the SSM plan elements – including the operation and maintenance procedures and the corrective action program – were binding requirements that were directly and independently enforceable. *Id.* § 63.6(e)(1)(ii)-(iii) (1994), C.A. JA927. *See* Pet. App. at 5a, 10a. Because SSM plans were incorporated into sources' operating permits (required under CAA Title V, 42 U.S.C. § 7661), they had to be reviewed for adequacy and approved by State permitting authorities. Pet. App. at 5a, 10a. The public could comment on SSM plans before they were approved, EPA could require inadequate plans to be revised, and the public could challenge the approval of inadequate plans in court. *Id.* After approval, the SSM plans were unconditionally available to the public which – like EPA or State permitting authorities – could use

them to evaluate whether specific exceedances of emission standards were or were not actually caused by SSM events and to assess and support enforcement measures. *Id.*

EPA described the combination of the general duty and the SSM plan requirements as "a reasonable bridge between the difficulty associated with determining compliance with emission standards during [SSM] events and a blanket exemption from emission limits" (59 Fed. Reg. 12408, 12423 (March 16, 1994), C.A. JA148), and stated that the "purpose" of the plan requirements was to "ensure" that facility owners abide by the general duty, *id.* at 12439, C.A. JA164).

The record showed that major sources of hazardous air pollutants routinely operate subject to the SSM exemption and the general duty rather than CAA § 112 emission standards and that, during such operations, they emit toxic pollution in quantities that vastly exceed their emission limits. SC Br. at 3-5 (citing administrative record). It further showed that the air toxics emitted during these exempted periods have severe adverse effects on health and welfare in communities across America. *Id.* at 5-8. *See also, e.g.*, C.A. JA937-953. Neither EPA nor ACC disputed these facts.

3. EPA's Elimination Of The Regulatory Constraints Promulgated To Contain The SSM Exemption

From 2002 to 2006, EPA revised the regulations containing the SSM exemption three times, *see* Pet. App. at 5a-7a. Contrary to ACC's claim (Pet. at 9),

the agency's revisions did not merely dispose of Title V review for SSM plans. EPA went so far as to retract the requirement that sources actually comply with their SSM plans, rendering the plans – which were the only specific emission control requirements of any kind that applied during SSM events – purely voluntary and unenforceable. Pet. App. at 10a. The agency also eliminated the requirement that SSM plans be incorporated by reference into Title V permits, the opportunity for EPA to require revisions to inadequate plans, and the opportunities for the public to comment on SSM plans and to challenge the approval of inadequate plans in court. *Id.* In addition, EPA eliminated the requirement that SSM plans be available for public review, instead allowing them to be revised in secret and kept secret on plant premises. *Id.* *See* SC Br. at 14-17, 29-30 (summarizing and citing provisions); SC Reply at 11 (same). As the Court found below, "these [were] not mere 'minor changes.'" Pet. App. at 10a (*quoting Envtl. Def. v. EPA*, 467 F.3d 1329, 1333 (D.C. Cir. 2006)). EPA had "'completely changed the regulatory context for its SSM exemption by stripping out virtually all the SSM plan requirements that it created to contain the exemption.'" *Id.* (*quoting* SC Br. at 29) (emphasis in original).

Throughout the rulemaking process, EPA received repeated comments from petitioners in the case below (collectively "Sierra Club") that both its changes to the SSM plan requirements and the underlying SSM exemption were unlawful. Sierra Club, June 4, 2002 Reconsideration Petition at 8, C.A. JA457; Environmental Integrity Project, *et al.* September 12, 2005 Comments at 2-7, C.A. JA463-

468. Sierra Club filed timely petitions for review of all three rules revising the SSM regulations under Clean Air Act § 307(b) and, because each rule contained changes that EPA had not proposed, Sierra Club also filed administrative petitions for reconsideration under § 307(d)(7)(b), 42 U.S.C. § 7607(d)(7)(B).

B. Proceedings Below

Sierra Club argued below that EPA reopened the SSM exemption by rescinding the SSM plan requirements that the agency had promulgated expressly to prevent it from becoming a blanket exemption from emission standards, SC Br. at 29-30, relying on longstanding D.C. Circuit precedent recognizing that agencies can effectively change an existing regulatory provision by changing closely interrelated provisions. *E.g., Kennecott Utah Copper v. United States Department of Interior*, 88 F.3d at 1191, 1214, 1227 (D.C. Cir. 1996). The panel concluded that EPA's progressive stripping of the regulatory constraints that the agency had originally placed on the SSM exemption and "general duty" fit within this doctrine, which the court refers to as "constructive" reopening. Pet. App. at 9a-13a. In particular, the court explained:

> EPA's modifications to the SSM plan requirements created a different regulatory construct as to the means of measuring compliance with the general duty. Because the general duty does not include any "numerical emission limits," 42 Fed. Reg. at 57125, the general duty assumes new shape depending on the means used to capture that standard. In

> 1994, EPA determined that compliance with the general duty on its own was insufficient to prevent the exemption from becoming a "blanket" exemption. It established the SSM plan requirements precisely because the general duty was inadequate. Now EPA has removed these necessary safeguards. Because the general duty was defined in 1994 through and housed in the four walls of the SSM plan requirements, EPA's modifications to those requirements have eliminated the only effective constraints that EPA originally placed on the SSM exemption.

Id. at 10a-11a.[1]

On the merits, the D.C. Circuit found the SSM exemption contrary to unambiguous statutory intent and therefore unlawful under "Step 1" of the analysis required by *Chevron USA, Inc. v. NRDC*, 467 U.S. 837, 842-843 (1984). Pet. App. at 13a-17a. It held that Clean Air Act § 112 and § 302(k), read together, "require[] that there must be continuous section 112-compliant standards" and that the "general duty" is not a § 112 standard of any kind. *Id.* at 15a.[2] The

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[1] The dissent below also recognized constructive reopening but found it inapplicable on these facts. Pet. App. at 18a-19a.

[2] Contrary to ACC's claim, the D.C. Circuit neither based its merits ruling exclusively on EPA's admission that the general duty is not a § 112 emission standard (Pet. at 3, 11), nor allowed EPA to use an admission in court to "reverse a well-settled rule without any administrative process or notice to interested parties" (*id.* at 23). The D.C. Circuit independently found that the general duty is not an emission standard, and merely noted that EPA had "[a]dmitt[ed] as much." Pet. App. at 15a.

D.C. Circuit concluded that "[b]ecause the general duty is the only standard that applies during SSM events – and accordingly no section 112 standard governs these events – the SSM exemption violates the CAA's requirement that some section 112 standard apply continuously." *Id.* [3]

Following the D.C. Circuit's decision, ACC petitioned for rehearing and rehearing en banc. Nowhere did ACC argue that the doctrine of constructive reopening was contrary to the statute or otherwise impermissible. To the contrary, ACC acknowledged that Sierra Club "could bring their challenge" if the SSM exemption was constructively reopened, and merely claimed that the Club had not satisfied the criteria established in D.C. Circuit

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[3] Without actually claiming the SSM exemption was lawful, ACC implies that it was not truly defective and that EPA might have obtained a different result in court if the agency had the opportunity to address comments on the SSM exemption and develop a record that better supported it. Pet. at 3, 11-12, 22-23. Because ACC does not seek review of the D.C. Circuit's decision that the exemption contravenes the statute, any such suggestions are irrelevant here. In any event, the D.C. Circuit held that the SSM exemption was unlawful under *Chevron* Step 1, and a rule that is contrary to law cannot be saved from its unlawfulness by any amount of factual support in an agency record. *See Chevron*, 467 U.S. at 842-843 (court and agency alike "must give effect to the unambiguously expressed intent of Congress"); EPA Response to Reh'g Pet. at 6-7 (acknowledging that because panel held SSM exemption unlawful under *Chevron* Step 1, further explanation of it would be pointless). Further, because the agency received repeated comments on the unlawfulness of its SSM exemption during its rulemakings to undo the SSM plan requirements, the agency had ample opportunity to address comments on this issue. Pet. App. at 5a-7a. *See supra* at 6.

precedent for constructive reopening. Pet. of Respondent-Intervenors for Reh'g and Reh'g En Banc ("Reh'g Pet.") at 7-9. On the merits, ACC argued that the general duty was a work practice standard under § 112(h) and therefore satisfied the Clean Air Act's requirement for continuous § 112-compliant standards. *Id.* at 10-11.[4] ACC also argued that the D.C. Circuit's decision would have dire practical effects for industry. *Id.* at 3-4, 22-25.

EPA did not seek rehearing, and opposed ACC's petition, stating "the Panel's analysis of its jurisdiction does not conflict with *Kennecott*, and thus does not meet the standards for rehearing en banc." EPA Response to Reh'g Pet. at 5. EPA also refuted ACC's claim on the merits that the general duty was a § 112(h) standard, agreeing with the Court's finding that "EPA has not purported to act under section 112(h)." *Id.* at 5 (quoting Pet. App. at 15a). In addition, EPA refuted ACC's claims of "dire consequences" from the ruling. It pointed out, among other things, that the agency has long implemented significant air pollution control programs – including the nationwide State Implementation Plan (SIP) program – without a blanket SSM exemption and without disruptive effects. *Id.* at 7-10.

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[4] Citing the dissent, ACC incorrectly claims the question of whether the general duty is an emission standard was not briefed below. Pet. at 11-12 (*quoting* Pet. App. at 20a-21a). The issue was fully briefed. SC Br. at 24-25, 24 n6, 25 n7; EPA Br. at 32-34 & 33 n5; SC Reply at 2-3.

The D.C. Circuit denied ACC's petition for rehearing en banc by a 5-3 vote.

REASONS WHY THE PETITION SHOULD BE DENIED

The petition for certiorari should be denied. ACC never raised its current argument that constructive reopening is impermissible below, either before the Panel or in its petition for rehearing en banc, and the D.C. Circuit has never addressed that argument in the present case or any other. The reasons underlying this Court's normal practice of declining to decide issues that were not raised or addressed below apply with particular force here, where ACC seeks to overturn longstanding and unbroken D.C Circuit precedent with respect to an issue on which that court has developed unique and extensive expertise.

Nor would there be a basis for review even if the issue had been raised below and passed on by the court of appeals. Contrary to ACC's claims, the decision below is entirely consistent with D.C. Circuit precedent, and does not conflict with any decision of any other lower court. Further, because ACC does not dispute that Clean Air Act regulatory provisions can be reopened for judicial review by agency action, its claim that they cannot be reopened in the specific circumstances addressed by the D.C. Circuit's constructive reopening precedent – *i.e.*, where the operation and effect of a regulatory provision is changed by an agency's subsequent retraction or overhaul of interlinked provisions – boils down to a fact-bound dispute with the D.C.

Circuit over which circumstances suffice to effect a reopening.

Nor does the opinion have the far-reaching effects that might militate in favor of review by this Court even in the absence of a true inter-circuit division of authority. The decision below does nothing to change longstanding D.C. Circuit precedent on constructive reopening, and cases involving that issue arise very rarely. The D.C. Circuit has found constructive reopening of rules only two times in the fourteen years since it recognized the concept in *Kennecott*, and no reported cases from other courts even address the issue. ACC's claims that the decision has adverse practical effects on its members merely reflect dissatisfaction with the Clean Air Act as written and are, in any event, without any factual basis.

I. THE QUESTION PRESENTED WAS NOT RAISED OR ADDRESSED BELOW.

ACC seeks certiorari to argue that a Clean Air Act rule can never be constructively reopened. Pet. App. at i, 13-14. In the briefing below, however, no party raised any such argument. Nor did ACC or any other party present such an argument by petition for rehearing. To the contrary, both ACC and EPA merely claimed in their merits briefs that the agency's actions did not suffice under the D.C. Circuit's case law to constructively reopen the SSM

exemption. Int. Br. at 17-18; EPA Br. at 23-27.[5] Indeed, ACC expressly acknowledged, in both its merits brief and in its rehearing petition, that rules can be constructively reopened. Int. Br. at 17-18 (*citing Envtl. Def.*, 467 F.3d at 1334); Reh'g Pet. at 7-8 (D.C. Circuit could review SSM exemption "if EPA had constructively reopened the exemption under *Kennecott*"). Not surprisingly, the D.C. Circuit panel did not address ACC's current argument that constructive reopening is unlawful. Addressing only the arguments actually before it, the D.C. Circuit explained that, based on the specific record before it, EPA had constructively reopened the SSM exemption to comment and judicial review in the particular circumstances here. Pet. App. at 10a-13a.

"This Court ... is one of final review, 'not of first view.'" *FCC v. Fox Television Stations*, 129 S. Ct. 1800, 1819 (2009) (*quoting Cutter v. Wilkinson*, 544 U.S. 709, 718 n7 (2005)). "It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed." *Duignan v. United States*, 274 U.S. 195,

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[5] In response to an alternative argument that the D.C. Circuit did not reach, EPA argued that administrative petitions are necessary where a party seeks review of an existing rule that "EPA has not reopened" based on its "substantive legal defects." EPA Br. at 27-28 (emphasis added). *See also* Int. Br. at 18 n3 (same). *Cf.* SC Br. at 30 ("even if EPA had not reopened the SSM exemption, this Court could still review it..."). No party, however, claimed that administrative petitions are necessary where a rule is reopened, either constructively or otherwise. *Compare* SC Br. at 29-30 (addressing reopening); EPA Br. at 23-27 (responding to reopening argument); Int. Br. at 12 18 (same).

200 (1927). *See Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 109 (2001) ("We ordinarily do not decide issues in the first instance not decided below.") (internal quotation marks and citation omitted); *EEOC v. FLRA*, 476 U.S. 19, 24 (1986) ("Our normal practice, from which we see no reason to depart on this occasion, is to refrain from addressing issues not raised in the Court of Appeals."); *Youakim v. Miller*, 425 U.S. 231, 234 (1976) ("Ordinarily, this Court does not decide questions not raised or resolved in the lower court.").

In this case, the reasons for adhering to this Court's normal practice are especially strong. The sole argument that ACC seeks to advance before this Court – that constructive reopening is impermissible – was neither raised nor addressed below. Further, the contentions ACC now raises – *e.g.*, that the panel's ruling on reopening "unravels the regular ordering of the administrative process" (Pet. 16) and that the decision conflicts with decisions of other circuits (Pet. 17-20) and with other decisions of the D.C. Circuit itself (Pet. 21-22) – are the prototypical grounds for seeking en banc review. Moreover, Congress expressly committed review of all nationally applicable Clean Air Act rules to the D.C. Circuit, 42 U.S.C § 7607(b)(1), and that court is uniquely well positioned to evaluate claims about its own longstanding precedent concerning the appropriate grounds for reopening under CAA § 307(b) and similar provisions as well as the broader implications of alternative rules for administrative law.

ACC's failure to present its current argument to the D.C. Circuit and the fact that the D.C. Circuit has never addressed or even had the opportunity to address that argument call for denial of ACC's petition for certiorari. *See Webster v. Cooper*, 130 S.Ct. 456, 457 (2009) (Scalia, J., dissenting from order vacating and remanding case) ("Since [petitioner] did not argue that ground to the Court of Appeals, and since that court did not address it, we would almost certainly deny certiorari. *See* Adarand *Constructors, Inc. v. Mineta*, 534 U.S. 103, 108-109 (2001) (*per curiam*) (dismissing a writ as improvidently granted because the question at issue was not raised or considered below)."); Robert L. Stern, *et al.*, Supreme Court Practice 459-60 (8th ed. 2002) (demonstration that issue was not raised or decided below is "ordinarily fatal to the petition").

II. THE ISSUE PRESENTED DOES NOT MERIT REVIEW BY THIS COURT.

A. The Case Below Does Not Create A Circuit Split.

1. The Decision Below Is Consistent With Other D.C. Circuit Decisions.

It is undisputed that Sierra Club timely filed petitions for review of all three of EPA's rules that revised its regulations containing the SSM exemption and that Sierra Club repeatedly objected to the SSM exemption during the public comment periods for those rules. The D.C. Circuit made clear that the SSM exemption, the general duty, and the rescinded SSM plan requirements were inextricably linked and that EPA's revisions to the SSM plan

requirements changed the SSM exemption's operation and significantly increased its adverse impacts for Sierra Club members and other people living in communities located near major sources of hazardous air pollutants. Pet. App. at 10a-13a. ACC does not challenge these conclusions. In short, it is now undisputed that the present case met all of the requirements for constructive reopening under longstanding D.C. Circuit precedent.

Although ACC does not ask this Court to review the lower court's ruling on this score, it nonetheless devotes considerable portions of its petition to arguing either that the D.C. Circuit is divided with respect to the permissibility of constructive reopening or that the decision below is inconsistent with D.C. Circuit precedent. Pet. at 11-12, 15-16, 17-22. Those contentions, which hardly support review by this Court, are in any event wrong. The D.C. Circuit has consistently held that a rule can be reopened when an agency significantly changes the effect of a regulatory provision by making subsequent changes to closely interrelated provisions. *Kennecott*, 88 F.3d at 1214, 1226-1227. *See also Nat'l Ass'n of Mfrs. v. EPA*, 134 F.3d 1095, 1104-1105 (D.C. Cir. 1998) ("NAM") (granting reopening claim); *Environmental Defense v. EPA*, 467 F.3d 1329, 1333-1334 (D.C. Cir. 2006) (rejecting reopening claim); *Sierra Club v. EPA*, Pet. App. at 8a-13a (granting reopening claim); *NRDC v. EPA*,

571 F.3d 1245, 1265-1266 (D.C. Cir. 2009) (rejecting reopening claim). [6]

Kennecott, for example, addressed a 1986 regulatory provision authorizing State officials to recover, from companies that had discharged oil or hazardous substances into navigable waters, the value of services lost to the public when those impaired waters were restored. 88 F.3d at 1226. In 1994, without changing that provision, the Department of the Interior (DOI) amended interrelated provisions in a way that "expanded the remedies for lost use values." *Id.* The D.C. Circuit found that by substantially changing the extent to which lost use values could be recovered, DOI reopened its decision to allow them to be recovered at all. *Id.* at 1226-1227.

Similarly, *NAM* found that DOI had constructively reopened provisions in a 1987 regulation under the Comprehensive Emergency Response, Compensation, and Liability Act (CERCLA) when it significantly changed related provisions in 1996. 134 F.3d at 1099-1100, 1103-1104. The 1987 regulations authorized the use of certain computer models to determine the amount of money that potentially responsible parties would be

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[6] Even before *Kennecott*, the D.C. Circuit noted that "[w]hile a petition from an agency order cannot be filed after the statutory period for filing has run, it may be that some of the issues that might have been raised in that appeal are so inextricably linked to a subsequent agency opinion on another aspect of the same case, that those issues may be raised in a timely appeal from the second opinion." *Cities of Batavia v. FERC*, 672 F.2d 64, 72 n15 (D.C. Cir. 1982).

assessed for natural resource damages. *Id.* at 1101-1102. The 1996 rule did not change the models, but significantly expanded the circumstances to which they could be applied. *Id.* at 1104. DOI's change to the regulatory context for the models reopened to challenge the predictive validity of the models themselves. *Id.* at 1105.

The D.C. Circuit carefully explained that the instant case fit within *Kennecott* and its other constructive reopening decisions. Pet. App. at 9a-13a. ACC does not challenge that determination here, and EPA has agreed that the reopening decision was fully consistent with D.C. Circuit precedent. EPA Response to Reh'g Pet. at 5.

2. There Is No "Intra-Circuit Conflict."

Even though no judge on the D.C. Circuit or any other court has ever heard ACC's current argument that constructive reopening is categorically impermissible, ACC implies that Judge Randolph and the three D.C. Circuit judges who voted to rehear the case below have endorsed it. Pet. at 11-12, 15-16. ACC further claims that the D.C. Circuit's constructive reopening decisions conflict with a separate line of cases allowing agency rules to be challenged outside of statutory review periods

following an administrative petition process. *Id.* at 17-22.[7]

An intra-circuit split is, as ACC appears to recognize (Pet at 21), normally a matter for resolution by the court of appeals, not this Court. *See* Sup. Ct. R. 10; *Davis v. United States*, 417 U.S. 333, 340 (1974). Indeed, a claim that two separate lines of decisions by a single court of appeals are in "conflict" is classic ground for the en banc procedure, *see, e.g.*, Fed. R. App. P. 35(a), and the usual rule that such claimed intra-circuit conflicts do not provide a basis for review by this Court applies with special force where the party seeking this Court's review failed to present the alleged intra-circuit conflict to the en banc court of appeals.

In any event, there is no merit to ACC's claim of "intra-circuit conflict," Pet. at 21. As noted above, the D.C. Circuit addressed constructive reopening claims on four occasions after its decision in *Kennecott* with different results depending on the specific evidence in the record before it. *See NAM*, 134 F.3d at 1104; *Environmental Defense*, 467 F.3d at 1333-1334; *NRDC*, 571 F.3d at 1265-1266; Pet.

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[7] The D.C. Circuit has held that this petition process is not available for rules subject to review under Clean Air Act § 307(b). *Amer. Rd. & Transp. Builders Ass'n v. EPA*, D.C. Cir. No. 08-1381 (December 11, 2009) ("*ARTBA*"), slip op. at 6-9, *pet'n for reh'g and reh'g en banc filed* (January 25, 2010). *See also National Mining Ass'n v. DOI*, 70 F.3d 1345, 1350, 1352 (D.C. Cir. 1995) (same holding under similar judicial review provision in Surface Mining Control and Reclamation Act). *Compare* Pet. At 15 (*citing* Pet. App. at 20a (Randolph, J., dissenting)).

App. at 9a-13a (decision below). On no occasion has any panel or individual judge even suggested that constructive reopening is categorically improper. Although Judge Randolph dissented below, he did not object to the doctrine generally, as ACC suggests (Pet. at 11-12, 15-16), but would have found only that it did not apply to the facts of the present case.

Nor is there "tension," as ACC claims (Pet. at 21-22), between the D.C. Circuit's reopening cases and its cases requiring administrative petitions in Clean Air Act challenges based solely on grounds arising after the sixtieth day or on claims that an existing regulation violates a statute. Rather, as the D.C. Circuit has made clear repeatedly, judicial review based on an agency's own actions reopening a rule is clearly distinct from judicial review based on an outside party's claim that the rule is either unlawful or subject to challenge on newly arising grounds. *Kennecott*, for example, explains that administrative petitions are generally required where a party challenges a rule after the statutory time period has passed based on a claim that is "violative of statute" but that they are not required where the agency itself has reopened the rule. 88 F.3d at 1213-1214. *See also Public Citizen v. NRC*, 901 F.2d 147, 150-153 (D.C. Cir. 1990), *cert. denied*, 498 U.S. 992 (1990) (contrasting petition process and reopening). Similarly, although administrative petitions are a prerequisite under Clean Air Act § 307(b)(1)'s provision for challenges "based solely on grounds arising after such sixtieth day," 42 U.S.C. § 7607(b)(1), *see Oljato Chapter of Navajo Tribe v. Train*, 515 F.2d 654, 666 (D.C. Cir. 1975), the D.C. Circuit has described that process as a "different

route" to judicial review than reopening, *Columbia Falls Aluminum v. EPA*, 139 F.3d 914, 920-921 (D.C. Cir. 1998). The D.C. Circuit has never required administrative petitions in reopening cases and, indeed, there is no need for them; reopening claims reach court only after a rulemaking process in which interested parties present their objections and the agency has a chance to respond. *See supra* at 6.

3. There Is No Inter-Circuit Split.

ACC's attempt to conjure up a split between the D.C. Circuit and other circuits (Pet. at 17-22) is equally without merit. By ACC's own description, *Dunn-McCampbell Royalty Interest v. Nat'l Park Service*, 112 F.3d 1283 (5th Cir. 1997), *Wind River Mining Corp. v. U.S.*, 946 F.2d 710 (9th Cir. 1991) and *Legal Envtl. Assistance Found. v. U.S EPA*, 118 F.3d 1467 (11th Cir. 1997), all involved claims that a longstanding agency action, unmodified by intervening agency action, was violative of statute. Pet. at 17-20. *Cf. Kennecott*, 88 F.3d at 1213. Also irrelevant are *Union Electric Co. v. EPA*, 515 F.2d 206 (8th Cir. 1975), *aff'd*, 427 U.S. 246 (1976) and *Save The Bay v. EPA*, 556 F.2d 1282 (5th Cir. 1977) (cited in Pet. at 20-22), as these were "new information" cases. *Cf. Oljato*, 515 F.2d at 665-666. *See also Columbia Falls Aluminum*, 138 F.3d at 920-921 (explaining difference between review based on agency reopening and on new information); *Public Citizen*, 901 F.2d at 150-153 (separately addressing review based on reopening and on claim that existing regulation is "violative of statute").

Notably, none of the allegedly conflicting opinions from other circuits even mentions the D.C. Circuit

precedents on reopening, and none of the D.C. Circuit's reopening decisions addresses the cases ACC now claims are inconsistent with them. In short, the cases on which ACC seeks to rely do not even speak to – far less conflict with – the D.C. Circuit's reopening decisions.

B. The Issue Presented By ACC Is Fact-Bound and Case-Specific.

Even if the absence of a circuit split or even an "intra-circuit split" could be overlooked, the Clean Air Act argument that ACC now seeks to raise for the first time in this Court (Pet. at 12-15) does not have any of the broad statutory and jurisdictional implications that ACC claims. In reality ACC's argument boils down to a fact-bound and case-specific dispute with the D.C. Circuit over which agency actions suffice to reopen an existing regulatory provision.

Clean Air Act § 307(b)(1) broadly authorizes judicial review of "any" final action by EPA, 42 U.S.C. § 7607(b)(1), and the D.C. Circuit has long recognized that "the period for seeking judicial review may be made to run anew when the agency in question by some new promulgation creates the opportunity for renewed comment and objection." *Ohio v. EPA*, 838 F.2d 1325, 1328 (D.C. Cir. 1988), *cert. denied sub nom. Nuclear Management and Resources Council v. Public Citizen*, 498 U.S. 992 (1990) (*citing Montana v. Clark*, 749 F.2d 740, 743-744 (D.C. Cir. 1984) *cert. denied sub nom Montana v.*

Hodel, 474 U.S. 919 (1985)).[8] ACC does not dispute that regulatory provisions can be reopened by agency action and that Clean Air Act § 307(b)(1) authorizes judicial review of reopened rules. Thus, the issue presented by ACC's petition is not whether a Clean Air Act rule can be reopened for judicial review, but whether the circumstances in a given case suffice to effect a reopening.

Whether a rule has been reopened is a fact-bound issue that the D.C. Circuit has always resolved case by case based on the whole administrative record. *CTIA*, 466 F.3d at110 (*quoting NARPO*, 158 F.3d at 141 (*quoting Public Citizen*, 901 F.2d at 150)). *See also Public Citizen*, 901 F.2d at 150 ("[T]he general principle [is] that if the agency has opened the issue up anew, even though not explicitly, its renewed adherence is substantively reviewable.") (*quoting Ass'n of American Railroads*, 846 F.2d at 1473). This is equally true whether an agency "creates the opportunity for renewed comment and objection," *Ohio*, 838 F.2d at 1328, by changing a regulatory provision directly or by changing its operation and effect on regulated entities or the public through major alterations to "inextricably linked" provisions,

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[8] *See generally P & V Enterprises v. U.S. Army Corp of Engineers*, 516 F.3d 1021, 1023-1024 (D.C. Cir. 2008); *CTIA – The Wireless Ass'n v. FCC*, 466 F.3d 105, 110 (D.C. Cir. 2006) ("CTIA"); *National Ass'n of Reversionary Property Owners v. STB*, 158 F.3d 135, 141 (D.C. Cir. 1998) ("*NARPO*"); *Kennecott*, 88 F.3d at 1214; *Edison Electric Co. v. EPA*, 996 F.2d 326, 331-332 (D.C. Cir. 1993); *Public Citizen*, 901 F.2d at 150; *Ass'n of American Railroads v. ICC*, 846 F.2d 1465, 1473 (D.C. Cir. 1988).

Pet. App. at 12a. Indeed, the D.C. Circuit has expressly held that constructive reopening is a type of reopening "within the broader meaning of *Ohio*." *Kennecott*, 88 F.3d at 1227. *See Environmental Defense*, 467 F.3d at 1333-1334 (court bases reopening decision on specific evidence in record before it).

Although ACC repeatedly claims that its argument is based on the Clean Air Act's "text," Pet. at 12-14, ACC does not identify any textual basis for distinguishing reopening of a regulatory provision based on subsequent changes to inextricably linked provisions from other types of reopening that ACC does not challenge. Nor does ACC suggest any way that this Court or any other court could determine when a reopening has occurred, other than on the case-specific and fact-specific basis that the D.C. Circuit has employed for decades. In short, the argument ACC advances is not a textual or statutory argument at all, but a challenge to the D.C. Circuit's resolution of a highly fact-bound issue that is presented differently in the context of each individual agency action. For this reason as well, it would not warrant review by this Court even had the question been duly raised below.

ACC also asserts the D.C. Circuit "acknowledged" that EPA did not reopen the SSM exemption. Pet. at 10. To the contrary, the D.C. Circuit held that EPA constructively reopened the SSM exemption (Pet. App. at 12a-13a), and then went on to review the SSM exemption on its merits (*id.* at 13a-17a) – something the Court would not have done absent a conclusion that EPA's actions had reopened the

exemption. *See, e.g.*, *Kennecott*, 88 F.3d at 1220-1221 (declining to review regulatory provision that was not reopened). Although the Court uses the terms "actual" and "constructive" to refer to different ways that an agency can create a "renewed opportunity for comment and objection" under *Ohio*, 838 F.2d at 1238, it has never suggested that these terms dictate any categorical difference with respect to whether a rule has been reopened for judicial review.[9]

Far from relying on the "subjective" perceptions of a party alleging that a rule has been reopened (Amicus Br. at 7-10), the D.C Circuit has always rigorously examined the administrative record in each case to determine whether and to what extent the operation of the challenged regulatory provision has been changed by subsequent revisions to interrelated provisions. Thus, in *Environmental Defense*, the D.C. Circuit rejected a claim based only on the petitioner's "own interpretation" and "understanding," unequivocally holding "[w]e require evidence." 467 F.3d at 1334 (emphasis in original). In *NRDC*, the D.C. Circuit rejected a reopening claim where the Court found EPA's

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[9] Contrary to ACC's claim (at 10), the conduct that the D.C. Circuit described as "not tantamount to *actual* reopening" was not the conduct that reopened the SSM exemption—i.e. EPA's retraction of the SSM plan requirements—but EPA's refusal to address unsolicited comment. Pet. App. at 9a (emphasis in original). In explaining that "such conduct" does not reopen a rule, D.C. Circuit simply noted a longstanding principle that "when the agency merely responds to an unsolicited comment by reaffirming its prior position, that response does not create a new opportunity for review." *Id.* (*quoting Kennecott*, 88 F.3d at 1213).

revisions did not work a "sea change" on the challenged provision. 571 F.3d at 1266. Conversely, in the only cases where the D.C. Circuit granted constructive reopening claims, it based its decision on strong record evidence of a major change to "inextricably linked" provisions that substantially altered the operation and effect of the reopened provision. Pet. App. at 12a. Here, EPA "eliminated the only effective constraints that EPA originally placed on the SSM exemption." *Id.* at 11a. By changing the requirements that governed sources' operation during the periods when the SSM exemption applied, EPA changed the operation and effect of the exemption itself. *See supra* at 17-18 (discussing reopening holdings in *Kennecott* and *NAM*).

C. ACC's Claims Of Legal Or Practical Significance Are Groundless.

1. The Decision Below Does Not Alter Existing Law, Threaten The Finality Of Agency Actions, Or Unravel Notice And Comment Rulemaking Procedures.

Contrary to ACC's assertions (Pet. at 2-3, 15, 16-17), the ruling below does nothing to alter existing law on the reopening of rules, nor will it open the floodgates to late challenges of agency actions, or unravel the normal notice-and-comment rulemaking process.

It is undisputed that the holding below was fully consistent with *Kennecott* and the D.C. Circuit's other prior constructive reopening decisions. *Kennecott* scarcely opened floodgates to cases of any

kind. Since *Kennecott* was decided in 1996, only four reported claims of constructive reopening have come before the D.C. Circuit and only two of those were found to have merit. Nor did *Kennecott* unravel administrative rulemaking procedures, an event that – had it occurred – would doubtless have attracted some notice by the agencies or the courts in the years since *Kennecott* was decided. Having failed to challenge the D.C. Circuit's holding that the instant case fits within *Kennecott* (Pet. App. at 10a-12a), dispute EPA's identical conclusion (EPA Response to Reh'g Pet, at 4-5), or otherwise identify any distinction between *Kennecott* and the present case, ACC can hardly claim that the present case will have any effect that *Kennecott* did not have.

2. The Alleged Impact Of the Decision Below On ACC's Members Does Not Warrant This Court's Review.

ACC's last argument is that effects the decision below allegedly will have on industry make this the "unusual case" worthy of this Court's review due to its "practical consequences." Pet at 23-25. That argument is unfounded.

The effect ACC describes, that companies would no longer have a blanket exemption from compliance with emission standards during SSM, is not a "stark" consequence of the D.C. Circuit's decision but the intended operation of the Clean Air Act's plain language (as interpreted by the D.C. Circuit in a holding that ACC, tellingly, does not ask this Court to review). As the D.C. Circuit explained, Congress gave EPA discretion to set different standards for different "classes, types, and sizes of sources" and to

set section § 112(h) work practice standards in lieu of § 112(d) emission standards in specific situations, but it neither provided an SSM exemption nor gave EPA discretion to provide one. Pet. App. at 16a. *See Whitman v. American Trucking Associations*, 531 U.S. 457, 485 (2001) (statutory limits on agency discretion must be given effect). *See also NRDC v. EPA*, 859 F.2d 156, 208-209 (D.C. Cir. 1988) (explaining that it is well within Congress's authority to require not-to-be-exceeded standards even where those standards reflect the use of fallible control technology).[10]

In any event, as EPA has already demonstrated, ACC's claims of "stark" consequences from the D.C. Circuit's decision, Pet. at 3-4, 22-25, have no basis in fact. *See* EPA Response to Reh'g Pet. at 9; EPA Letter at 2-4. The "majority" of EPA's rules under Clean Air Act § 112 "include specific regulatory text that exempts or excuses compliance during SSM events, and such text is in addition to, or in lieu of" a cross reference to the vacated SSM exemption. EPA Letter at 2. Even for those rules that do not include an SSM exemption other than the one vacated by the decision below, EPA's initial evaluation – which the agency has not changed – "indicates that most of these rules should not present compliance issues for

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[10] Although the Clean Air Act does not allow EPA to excuse violations by providing a blanket exemption from compliance with emission standards at the liability stage, it expressly requires both EPA and the courts to consider sources' "good faith efforts to comply" in determining what penalty, if any, should be assessed for violating emission standards. 42 U.S.C. § 7413(e)(1).

sources during SSM events." *Id.* at 3. And for any sources that are unable to comply with emission standards during SSM events, "EPA will determine an appropriate response based on, among other things, the good faith efforts of the source to minimize emissions during SSM periods ... and whether the source has developed and implemented an SSM plan to minimize such emissions." *Id.* *See* 42 U.S.C. § 7413(e)(1).[11]

To the extent the decision below indicates that the SSM exemptions still contained in other § 112 rules are unlawful, EPA can address those exemptions in a normal rulemaking process. EPA Letter at 4. Indeed, EPA could not alter those rules without notice and comment rulemaking, and ACC's members would have an opportunity to participate in any such rulemaking and to challenge the results in court. As ACC itself has noted, the D.C. Circuit did not hold that § 302(k) requires "unchanging" standards under § 112 and EPA has already proposed specific alternative standards to apply

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[11] ACC repeatedly suggests that EPA would have made its § 112 standards less stringent if the SSM exemption had not been in place. Pet. at 3-4, 12-13, 23-24. Although this Court need not address that issue, which can be resolved by EPA or by the D.C. Circuit if necessary, the notion that EPA would or could have set standards at a different level absent the SSM exemption is purely speculative. If ACC's members or other entities believe that vacatur of the SSM exemption warrants changes in the stringency of specific § 112 rules, they can seek revision of those rules under Clean Air Act § 307(b)(1). *See Oljato*, 515 F.2d at 666; *supra* at 20. Two industry groups have done so. *See The Aluminum Ass'n v. EPA*, D.C. Cir. No. 09-1303 (filed December 11, 2009); *Amer. Forest & Paper Ass'n v. EPA*, D.C. Cir. No. 09-1311 (filed December 15, 2009).

during startups and shutdowns for at least one industry. Reh'g Pet. at 13 & n. 6. Thus, if ACC believes that the standards contained in those rules should be less stringent if EPA removes the SSM exemption (*see* Pet. at 3-4, 12-13, 23-24), it can present that argument to EPA if and when the agency engages in a rulemaking to do so.

Finally, contrary to ACC's suggestion, it is neither novel nor unusual for EPA to require continuous compliance with emission standards and not provide a blanket SSM exemption. EPA's pre-1990 air toxics standards required compliance "at all times," and provided no SSM exemption. 59 Fed. Reg. 12408, 12423 (March 16, 1994), JA 148. *See* EPA Response to Reh'g Pet. at 7-8 Likewise, EPA requires continuous compliance with "best available control technology" (BACT) standards and has repeatedly rejected the type of blanket SSM exemption struck down in the decision below. *See* SC Br. at 27-28; EPA Response to Reh'g Pet. at 7-8. The technologies on which these standards are based are no more infallible than the technology used to comply with § 112 standards, but these programs have not produced any of the draconian results about which ACC speculates.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

AMERICAN CHEMISTRY COUNCIL, AMERICAN FOREST AND PAPER ASSOCIATION INC., AMERICAN PETROLEUM INSTITUTE, NATIONAL PETROCHEMICAL & REFINERS ASSOCIATION,

Petitioners,

v.

SIERRA CLUB, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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RULE 29.6 STATEMENT

Petitioner American Forest & Paper Association ("AF&PA") is the national trade association of the forest, paper and wood products industry.

Petitioner American Petroleum Institute ("API") is a nationwide, not-for-profit association.

National Petrochemical & Refiners Association ("NPRA") is a national trade association.

The AF&PA, API, and NPRA have no parent companies, and no publicly-held company has a 10% or greater ownership interest in either the AF&PA, API, or NPRA.

The American Chemistry Council ("ACC") is a not-for-profit trade association. ACC has no outstanding shares or debt securities in the hands of the public and has no parent company. No publicly held company has a ten percent (10%) or greater ownership interest in ACC.

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REPLY BRIEF FOR PETITIONERS

The D.C. Circuit's holding is that a regulation adopted in 1994 can be reviewed more than a decade later, notwithstanding the unequivocal language of 42 U.S.C. §7607(b)(1), that such a challenge is barred if not brought within the 60 days after the regulation is published. Every other circuit (and many panels of the D.C. Circuit) would hold that such a challenge is time-barred and that the challengers must seek rescission of the rule by the agency first and then proceed with judicial review if the agency chooses not to withdraw the rule. That approach is textually required and it promotes an orderly administrative process. Indeed, the Solicitor General agrees that the decision below is clearly wrong. That is an understatement. The D.C. Circuit's holding is lawless, tramples important reliance interests, and in this particular case wreaks havoc on a wide array of industries. Those are reasons enough to warrant certiorari and nothing that respondents offer detracts from that conclusion.

Respondents make four principal arguments. First, Sierra Club asserts that the Petitioners' claim was not made below. Second, both Respondents allege that, regardless of the court's error, there is no circuit split on the question presented. Third, they assert that the D.C. Circuit's jurisdiction over cases outside the statutory period for review has minimal practical importance. Finally, they suggest that the vacatur of the SSM provision itself has little practical importance. On each question, the United States and Sierra Club are mistaken. Petitioners presented their claim to the D.C. Circuit, which clearly decided it; there is a square conflict among the circuits; the decision below will introduce increasing uncertainty

into judicial challenges to agency decisions; and the decision below threatens regulated industries with substantial, unavoidable liability.

I. PETITIONERS RAISED THE QUESTION PRESENTED IN THE D.C. CIRCUIT.

The question presented here was both presented and decided below. In their brief before the D.C. Circuit, Petitioners stated:

> The appropriate way to challenge a long-standing regulation believed to violate a statute is to file a petition to amend or rescind the rule and then challenge if denied. Petitioners' claim that the petition process would be a "waste of time and resources" cannot stand. With a petition, all interested parties, including industry intervenors, may fully participate in the proceedings. If Petitioners followed this required path, this Court would have a complete record on which to base its review, hardly a waste of time or resources.

Int. Br. at 18 n.13 (internal citations omitted). Thus, the question presented in this case was presented below. Furthermore, it was actually decided below. *Va. Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1099 n.8 (1991); *Stevens* v. *Dep't of Treasury*, 500 U.S. 1, 8 (1991). Indeed, the question presented was one of the subjects of the dissent. Pet. App. at 20a.

The court of appeals held that "[a] constructive reopening occurs if the revision of accompanying regulations 'significantly alters the stakes of judicial review.'" Pet. App. at 9a. That holding is what Petitioners are challenging; they believe there is no basis in the statute to allow that result. That issue is clearly fair game for this Court. *Yee* v. *City of Escondido*, 503 U.S. 519, 535 (1992).

II. THE CIRCUITS ARE DIVIDED ON THE QUESTION WHETHER A PETITIONER SEEKING TO CHALLENGE A LONG-STANDING RULE MUST FIRST FILE A PETITION TO RESCIND.

Both the United States and Sierra Club analyze the issue as if the term "constructive reopening" has some talismanic meaning. It does not; it is the flip side of the coin that insists that the proper approach is for the challenging party to file a petition to rescind the rule and seek judicial review of that order, if appropriate. Thus, the repeated assertion that other circuits do not specifically reject "constructive reopening" is irrelevant. *See, e.g.*, US Br. at 12; Sierra Club Br. at 21–22. On the relevant question—whether a party seeking to challenge a longstanding rule must first file a petition to rescind—the circuits are squarely divided.

The government accurately summarizes the situation when it states "the courts of appeals have held that a party may obtain judicial review of even a long-established rule by petitioning the agency to amend or rescind it and then seeking judicial review if that petition is denied." US Br. at 12. The government also notes, accurately, that the other circuits do not mention, or invoke and then reject, the D.C. Circuit's "constructive reopening" terminology. *Id.* at 13. But there is no magic in that terminology. Given the clarity of the statute, hardly anyone would assume that any kind of "reopening" is available, constructive or otherwise. Thus, that the other courts reject the D.C. Circuit's doctrine in fact, if not by name, is more than enough reason to warrant this Court's review.

The government suggests that the other circuits have not "held that seeking review of the denial of a

petition to rescind is the exclusive means of securing review of an old rule." *Id.* That is not a fair reading of the decisions of the other circuits. Of course, there may be other means to review an "old rule," if the text of the relevant statute allows challenges whenever the rule is applied or whenever new circumstances require. But when a rule is "old" in the sense that the text of the statute dictates that review is no longer available, the other courts of appeals' opinions, fairly read, indicate that seeking review of the denial of a petition to rescind is the only appropriate means of securing review.[1]

For instance, when the Fifth Circuit held that the petitioner's challenge was time-barred in *Dunn-McCampbell Royalty Interest, Inc.* v. *National Park Service*, 112 F.3d 1283 (5th Cir. 1997), it noted: "If Dunn-McCampbell were able to point to . . . an application of the regulations [to Dunn-McCampbell] here, or if they had petitioned the National Park Service to change the . . . regulations and been denied, this court might have jurisdiction to hear that case." *Id.* at 1287–88. Thus, the Fifth Circuit identified only two ways to avoid the time bar. First, the petitioner could identify an application of the statute to itself—this exception does not apply in Clean Air Act cases. *Compare id.* at 1288, *with* 42 U.S.C. § 7607(b)(2). Second, the petitioner can

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[1] Of course, the rule then reviewed is the denial of the petition to rescind, not the "old rule," because the old rule is still shielded from *direct* review. *See Legal Envtl. Assistance Found., Inc.* v. *EPA*, 118 F.3d 1467, 1473 (11th Cir. 1997).

There are other ways to direct an agency to reexamine an old rule. For instance, a court could vacate a *new* rule because that new rule drastically changed the regulatory context of an old rule, and instruct the agency that if it wishes to avoid vacatur of the new rule, it must reconsider the old rule.

petition to rescind the regulation in question. It is impossible to read the Fifth Circuit's opinion as countenancing any other way around the time bar. After all, the Circuit was relying explicitly on a decision holding that one may bring an action outside the statutory time period "*only* by petitioning the agency to review the application of the regulation to that particular challenger." 112 F.3d at 1287 (citing *Wind River Mining Corp.* v. *United States*, 946 F.2d 710, 715 (9th Cir. 1991)) (emphasis added).[2]

Similarly, in *Union Electric Co.* v. *EPA*, 515 F.2d 206 (8th Cir. 1975), *aff'd*, 427 U.S. 246 (1976), the court concluded that "[i]t is *only* when the Administrator fails to act upon the basis of the new information presented to him that a petition for review is proper." *Id.* at 220 (emphasis added). And this position was adopted by the D.C. Circuit in *Oljato Chapter of Navajo Tribe* v. *Train*, 515 F.2d 654, 666 (D.C. Cir. 1975), and embraced by the Fifth Circuit in *Save the Bay, Inc.* v. *EPA*, 556 F.2d 1282 (5th Cir. 1977).

Sierra Club, for its part, suggests that the decisions of the other circuits would not require filing a petition for review in this case because those cases merely concern situations in which there is "new information." Sierra Club Br. at 21. But if this is a distinction, it cuts the other way. After all, the statutory text of the CAA expressly provides an exception to the 60-day bar for petitions raised on the basis of new information: "if such petition is based

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[2] The Fifth Circuit accurately characterized *Wind River*, which clearly implied that the petition to rescind process was the exclusive means of avoiding the statutory time bar. *Wind River*, 946 F.2d at 715. *Wind River* emphasized that "the narrow scope of challenges to agency decisions that" it allowed would not undercut the statutory time bar. *Id.* at 716.

solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise." 42 U.S.C. § 7607(b)(1). If a party must file a petition to rescind when there *is* "new information," surely it must file such a petition when there is not. Thus, the decisions of the other circuits are in direct conflict with the decision below on the question presented.

III. THE DECISION BELOW WILL INTRODUCE SUBSTANTIAL UNCERTAINTY INTO THE AGENCY REVIEW PROCESS.

The government predicts that the D.C. Circuit's practice of asserting jurisdiction outside the statutory time period for review will be infrequently employed, and thus will have little effect. US Br. at 10–12. This prediction is unsupportable.

First, the government argues that, in the past, "plaintiffs have rarely invoked the 'constructive reopening' doctrine." US Br. at 18. That is hard to determine, given the lag between filing petitions for review and published decisions resulting from that petition. Sierra Club filed this case in April 2002, relatively soon after the first spate of "constructive reopening" decisions appeared. *See, e.g.*, *PanAmSat Corp.* v. *FCC*, 198 F.3d 890, 894 (D.C. Cir. 1999); *Nat'l Ass'n of Mfrs.* v. *Dep't of the Interior*, 134 F.3d 1095, 1104 (D.C. Cir. 1998); *Kennecott Utah Copper Corp.* v. *Dep't of the Interior*, 88 F.3d 1191, 1214 (D.C. Cir. 1996). Indeed, that generation of cases seems to have spawned another generation. *See, e.g.*, Pet. App. at 1a–21a; *NRDC* v. *EPA*, 571 F.3d 1245 (D.C. Cir. 2009); *Envtl. Def.* v. *EPA*, 467 F.3d 1329, 1333–34 (D.C. Cir. 2006). In any event, two published decisions issued within months of each other is hardly evidence that the "constructive reopening" line of cases is going away.

Second, there is reason to think that the volume of these cases may soon increase dramatically. This is because of the D.C. Circuit's recent decision in *American Road & Transportation Builders Association* v. *EPA*, 588 F.3d 1109, 1112 (D.C. Cir. 2009), which held that the petition for review procedure may not be used to bring a challenge that could have been brought when the rule was first promulgated, even if the challenge is substantive. *Id.* at 1113. This rule, which also appears inconsistent with those of the other circuits, will push more and more D.C. Circuit plaintiffs to the "constructive reopening" argument.

IV. THE VACATUR OF THE SSM RULE WILL HAVE SERIOUS AND UNAVOIDABLE ADVERSE IMPACTS.

The government argues that the decision below "only" applies directly to 35 source categories, and that EPA is fixing the rest.[3] US Br. at 14–16. As noted below, changing 35 rules is a massive task. And, as the government has acknowledged, seventy-four more categories have now been "called into question." Kushner Letter at 2 n.1; *see also* Chamber of Commerce Br. at 12 n.3. And some of these categories use language that closely mirrors the SSM provision at issue below. Kushner Letter at 2 n.1.

Furthermore, the government's recent actions show that the decision may have even broader consequences. EPA summarily removed an exemption for

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[3] A letter from the government and its brief in opposition also state, without precision or support, that "most" source categories do not need to rely on the SSM provision referenced in their rules, for "various reasons." US Br. at 14–15 (citing Letter from Adam M. Kushner, Director, Office of Civil Enforcement 2-3 (Kushner Letter), *available at* http://www.epa.gov/compliance/civil/caa/ssm-memo080409.pdf).

SSM that had been in place since 1997 for hospital, medical, and infectious waste incinerators, finding that the D.C. Circuit's ruling applies to waste incinerators regulated by another section of the Clean Air Act, 74 Fed. Reg. 51,368, 51,375 (Oct. 6, 2009) (to be codified at 40 C.F.R. pt. 60).

Regardless, even thirty-five rules, standing alone, would take many years to promulgate. The most recent Government Accountability Office (GAO) report on the topic notes that "[D]eveloping MACT [Maximum Achievable Control Technology] standards for hazardous air pollutants can take up to 3 years." GAO, *Mercury Control Technologies at Coal-Fired Power Plants Have Achieved Substantial Emissions Reductions* 2 (Oct. 2009).

Historically, these standards are notoriously difficult to promulgate, and require years to adopt. The 1990 Clean Air Act Amendments charged EPA with issuing MACT rules for all major sources of 189 toxic pollutants under a phased schedule. 42 U.S.C. § 7412(e). But within the first year of that effort, the GAO determined that EPA could not meet the prescribed schedule "because some data take years to acquire." GAO, *EPA's Strategy and Resources May Be Inadequate to Control Air Toxics* 3 (June 1991). In April 2000, GAO found that EPA missed its deadline for *102 of 117* hazardous air pollutant requirements. GAO, GAO/RCED-00-72, *Status of Implementation and Issues of the Clean Air Act Amendments of 1990*, at 11 (Apr. 2000). The government's assertion that it can "quickly" solve the problems created by the decision below is a triumph of wishful thinking over the documented reality of EPA's MACT regulation history.

Finally, the government suggests that the practical impact of the decision below may be minimized

because it could use "enforcement discretion." US Br. at 16. But this is not a binding commitment to forswear civil or criminal enforcement actions against sources that have done everything possible to comply with now unattainable standards. Instead, it merely notes that it will consider "among other things, the good faith efforts of the source to minimize emissions during SSM events." *Id.* (quoting Kushner letter at 3). A close read of this statement reveals that EPA has promised *very* little. Most importantly, neither the government nor Sierra Club suggests how sources faced with unattainable standards will be protected from the substantial penalties that citizens' enforcement suits could impose. 42 U.S.C. § 7604(a).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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Supreme Court of the United States

AMERICAN CHEMISTRY COUNCIL, AMERICAN FOREST AND PAPER ASSOCIATION INC., AMERICAN PETROLEUM INSTITUTE, NATIONAL PETROCHEMICAL & REFINERS ASSOCIATION,

Petitioners,

v.

SIERRA CLUB, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS*

The Chamber of Commerce of the United States of America (the "Chamber") represents 300,000 direct members and indirectly represents an underlying membership of three million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations.[1] Members of the Chamber span numerous industries that operate facilities throughout the United States. Many of these facilities emit air pollutants regulated under the Clean Air Act, including, but not limited to, National Emission Standards for Hazardous Air Pollutants ("NESHAPs") promulgated by the U.S. Environmental Protection Agency ("EPA") pursuant to Section 112, 42 U.S.C. §7412. More generally, the Chamber's members have a strong interest in the finality of administrative rules and regulations, an interest severely undermined by the decision below.

SUMMARY OF ARGUMENT

For a business to operate, it must have some degree of certainty to identify its ongoing and upcoming obligations. Changes to manufacturing facilities, in particular, often require substantial amounts of capital investment to purchase and install required equipment. When new regulations

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represent that the brief was not authored in whole or in part by counsel for a party and that none of the parties or their counsel, nor any other person or entity other than *amicus*, its members, or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief, and letters reflecting their consent have been filed with the Clerk.

are promulgated, long-term planning is needed to ensure that sufficient resources, labor and time are available for a facility to come into compliance. To these ends, procedural certainty and finality of agency actions are vital.

Procedural certainty comes from a regular and orderly administrative process. Congress and courts have provided numerous procedural protections to promote and maintain the integrity of the administrative process, such as requiring all interested parties to make their concerns known to the agency during the rulemaking process. "Finality ordinarily assures regularity of administrative process and avoids unfairness to parties who have relied on a final decision." *Blanco Oil Co. v. FERC*, 598 F.2d 152, 163 (D.C. Cir. 1979). Congress has recognized the importance of imparting finality into the administrative process, imposing strict time limits on the jurisdiction of courts to review agency actions.

In this case, the D.C. Circuit eschewed a sixty-day limitation on seeking judicial review imposed by Congress under the Clean Air Act, choosing instead to rely on claims by the petitioners below (hereinafter referred to as "Sierra Club") that circumstances had changed since the time of promulgation which the D.C. Circuit found made the regulation now "worth" challenging many years later. In so doing, the D.C. Circuit vacated a regulation that was promulgated in 1994, and relied on by EPA and regulated entities since that time, based on a test that provides no clear, objective standard to determine whether a regulation can truly be considered "final." Rather, it looked to the

subjective belief and concerns of the challenging party. As a direct result of allowing this challenge to be brought outside the normal review process, the D.C. Circuit vacated these long-standing provisions without a record on which to review, and without giving the parties an opportunity to fully address the merits. The D.C. Circuit's decision below, therefore, has circumvented and undermined the regular order of the administrative process and has rendered virtually impossible the finality sought by Congress.

Moreover, the D.C. Circuit's expansive application of its so-called "constructive reopening" doctrine is not limited to the Clean Air Act, but applies broadly to virtually all areas of administrative actions.

As this case shows, the sudden judicial "reopening" of a regulation long after the statutory period for challenges has passed can have enormous ripple effects on myriad other agency rules and orders that have been relied on as apparently final regulations for years. If it stands, for example, the D.C. Circuit's decision calls into doubt at least 35 standards that expressly incorporated the now-vacated provisions. Many of these standards have been in place for over a decade, and industry has spent millions to ensure compliance with these standards. The long-settled expectations and investments of industry are now upset, with no clear path for industry to ensure compliance with standards that now may be applicable.

In promulgating the general provisions for startup, shutdown and malfunctions ("SSM"), EPA necessarily recognized that technology standards

may not be met at all times, often for reasons out of the operator's control. Industry, after making substantial investment in reliance on EPA's long-standing regulation, is now subject to potential enforcement actions or citizen suits for emissions during events that EPA has long-recognized may be impossible to control.

To protect the integrity of the administrative process and remove incentives for parties to sit on their rights only to upset long-standing investments, Supreme Court review of the D.C. Circuit's decision below is warranted.

ARGUMENT

I. The D.C. Circuit's Subjective Reopening Test Disrupts the Orderly Administrative Process and Eviscerates the Finality of Regulations Relied on by Industry.

A. Industries need the finality of statutory time limits to protect the substantial investment needed to comply with regulations.

Industry relies on an orderly administrative process to make the often significant investments required to comply with new regulations. Final resolution of administrative actions is essential to this orderly process.

Congress and courts have long sought to protect an orderly administrative process, including consummation of that process. Both the Administrative Procedure Act and the Clean Air Act

seek to ensure adequate public participation so that interested parties may make their case before the agency, presenting information the agency needs to understand the costs, benefits, and any potential problems with proposed regulations. 5 U.S.C. §553; 42 U.S.C. §7607(d). Courts are then limited to the administrative record in reviewing agency action; that is, the information made available to the agency during its deliberative process. 5 U.S.C. §706; 42 U.S.C. §7607(d)(7). This ensures that the administrative process is fair prior to imposing restrictions on regulated entities, and that regulatory agencies have all the relevant information before them.

This process also ensures there is a consummation to agency action; "If upon the coming down of the order litigants might demand rehearings as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening." *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 555 (1978) (quoting *ICC v. Jersey City*, 322 U.S. 503, 514 (1944)).[2] *See also Sierra Club v. Block*, 576 F. Supp. 959, 965 (D. Or. 1983) ("The integrity of the administrative process is threatened when agencies'

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[2] This Court has warned against petitioners turning administrative proceedings into "a game or a forum to engage in unjustified obstructionism" by failing to provide meaningful comment. *Vt. Yankee Nuclear Power Corp.*, 435 U.S. at 553-54. Here, Sierra Club did not comment on the legality of the general SSM provision when proposed in 1993.

intentions and participants' expectations as to the finality of administrative decisions are not upheld in the face of subsequent challenges."). Indeed, the D.C. Circuit rejected Sierra Club's attempt to assert that EPA "actually" reopened the issue in subsequent rulemakings to restart the statutory time limit on seeking review. *Sierra Club v. EPA*, 551 F.3d 1019, 1024-25 (D.C. Cir. 2008).

Statutory time limits on seeking judicial review serve the important purpose of providing finality to the administrative process. Statutes of limitation established by the legislature are intended to "cut off rights, justifiable or not," in order to bring a final resolution. *Kavanagh v. Noble*, 332 U.S. 535, 539 (1948). A jurisdictional time limit imposed by Congress on seeking judicial review of agency action "is intended and in fact brings finality to the administrative process and reflects 'a deliberate congressional choice to impose statutory finality on agency [action], a choice [courts] may not second-guess.'" *W. Neb. Res. Council v. EPA*, 793 F.2d 194, 198 (8th Cir. 1986) (quoting *Eagle-Picher Indus., Inc. v. EPA*, 759 F.2d 905, 911 (D.C. Cir. 1985)) (first alteration in original). *See also JEM Broad. Co. v. FCC*, 22 F.3d 320, 325 (D.C. Cir. 1994) (quoting *Mountain States Tel. & Tel. Co. v. FCC*, 939 F.2d 1035, 1040 (D.C. Cir. 1991)) ("Congress has 'determined that the agency's interest generally lies in prompt review of agency regulations,' and '[w]e accord heavy weight to that view.'") (alteration in original).

In addition to conserving administrative resources, the finality brought about by statutory time limits on review "protect[s] the reliance

interests of regulatees who conform their conduct to the regulations." *Natural Res. Def. Council v. Nuclear Regulatory Comm'n*, 666 F.2d 595, 602 (D.C. Cir. 1981). By providing express statutory time frames for implementation of new Clean Air Act regulatory requirements, Congress recognized that facilities need an appropriate time to come into compliance. Plans must be developed, funding must be established, capital investments must be made, and equipment must be obtained and installed to meet new requirements in the time period allowed. EPA has recognized that "an appropriate time of regulatory certainty" and "a sufficient period of time for planning long-term capital improvements" is required for industry to make investments and address regulatory requirements. *New York v. EPA*, 413 F.3d 3, 37 (D.C. Cir. 2005) (upholding EPA's use of ten-year period for use of plantwide applicability limits under Clean Air Act's New Source Review program). Similarly, public sector facilities subject to new requirements must be able to raise public funds to take the necessary actions, which can be time-consuming. Judicial reopening of regulations industry has long relied upon well beyond the applicable limitations period, as the D.C. Circuit has done in this case, throws this scheme into disarray.

B. Under the subjective "reopening" test adopted below, industry could never rely on the finality of administrative actions, despite Congress's express limits on judicial review.

There is no dispute that the Sierra Club could have challenged the legality of the SSM provision at the time it was adopted. Instead, it raised its

challenge years later and contended that changes to the SSM plan requirements "significantly altere[d] the stakes of judicial review" compared to when the SSM provision was issued in 1994. Corrected Final Opening Br. and Addendum of Environmental Petitioners, at 31, *Sierra Club v. EPA*, No. 02-1135 (D.C. Cir. filed Mar. 19, 2008) (quoting *Kennecott Utah Copper v. DOI*, 88 F.3d 1191, 1226-27 (D.C. Cir. 1996)). Neither the text of the regulation, nor EPA's interpretation of it, has changed in the many intervening years since its adoption. Yet, the D.C. Circuit found that "from the perspective of environmental petitioners' interests and allocation of resources the general duty 'may not have been worth challenging in [1994], but the [revised] regulations gave [that duty] a new significance'" and allowed the untimely claim to move forward because it found that new circumstances "changed the calculus for petitioners in seeking judicial review." *Sierra Club*, 551 F.3d at 1026 (quoting *Kennecott*, 88 F.3d at 1227). The D.C. Circuit has created a subjective test with no clearly defined parameters for the agency, the public, or industry to determine when an agency action is "final."

Shortly after its decision below, the D.C. Circuit again had occasion to utilize this subjective test for constructive reopening, reaching the opposite conclusion on similar facts. *Natural Res. Def. Council v. EPA*, 571 F.3d 1245 (D.C. Cir. 2009). In that case, the D.C. Circuit, in another 2-1 opinion, declined to find constructive reopening to allow untimely challenges to two provisions, finding, for one, the "stakes" for review were not "quantitatively different" from when the provision was issued in 1989, and, for the other, the provision "if unlawful,

seems worth challenging in its own right" when issued in 1980. *Id.* at 1266, 1270-71. There is no appreciable difference in the factual circumstances of these two cases, and the D.C. Circuit made no findings distinguishing the two cases. But in one case the court found the issue may not have been "worth" challenging during the statutory limitations period, and thus allowed review later, while in the other case the court found the issue "seem[ed] worth challenging" during the limitations period, and disallowed later review. These inconsistent findings highlight the difficulty in applying the ad hoc, subjective test for jurisdiction fashioned by the D.C. Circuit. If the decision below is allowed to stand, industry will never be able to predict what future regulatory changes or rulings might be deemed to affect sufficiently the "stakes" for judicial review in the judgment of potential adverse parties and the court.

The decision below further illustrates the unfairness and havoc that results from adopting a subjective test to determine the limits of a Court's jurisdiction. After finding it had jurisdiction, the D.C. Circuit went on to invalidate the 14-year old rule based on an issue that was not raised in the subsequent actions by EPA, and thus had no record for review, and that had not even been fully briefed by the parties. *Sierra Club*, 551 F.3d at 1030 (J. Randolph) (in dissent). As the Petitioners here point out, and as EPA argued in its merits brief (Final Br. of Resp'ts, at 27-30, *Sierra Club v. EPA*, No. 02-1135 (D.C. Cir. filed Mar. 14, 2008)), the proper procedure should have been to require a petition for rulemaking and establish a record for review. Pet. at 15-22. At least in those circumstances, the affected

parties and the public would have had an opportunity to comment fully on the proposed change, and the agency would have been required to make the requisite findings before the SSM general provision, which required facilities to minimize their emissions during periods of SSM, was replaced by standards originally issued for steady-state operation. Had the court below required these procedures, a record would have been developed and any briefing before the court would have been able to address the false premise on which the D.C. Circuit decided the case—*i.e.*, that Section 112(d) does not permit a standard for SSM periods that requires sources to minimize emissions. Under the D.C. Circuit's decision, regulated entities will now be forced to comply with standards during those periods without any agency determination that those standards are "achievable," as Section 112(d)(2) of the Act requires. *See*, *infra*, Part II.

C. The decision below effectively eliminates the Clean Air Act's strict time limits on judicial review and reopens numerous, longstanding regulatory rules.

The Clean Air Act is intended to address this nation's air pollution problems. 42 U.S.C. §7401(b). In so doing, Congress included numerous, often aggressive time frames for regulation and compliance. *See, e.g., id.* §7502(a)(2) (requiring attainment with NAAQS within 5 years of designation as nonattainment). This "sense of urgency concerning environmental protection" manifests itself in strict time limits Congress imposed on seeking judicial review of agency actions under the Act. *Peabody Coal Co. v. Train*, 518 F.2d

940, 943 (6th Cir. 1975). *See also* S. Rep. No. 92-414, at 83 (1971), *as reprinted in* 1972 U.S.C.C.A.N. 3668, 3756 ("In order to maintain the integrity of the time sequences provided throughout the [Clean Water] Act, the section would provide that any review sought must be filed within 30 days of the date of the challenged promulgation or other action."). In the Clean Air Act, Congress imposed a sixty-day limit on judicial review of agency actions. 42 U.S.C. §7607(b).

Standards under Section 112(d) become effective immediately for new sources, and existing sources must comply with new standards within three years. 42 U.S.C. §7412(d)(1), (i)(3)(A). EPA may provide an extension of time up to one additional year "if such additional period is necessary for the installation of controls." *Id.* §7412(i)(3)(B). With these strict time frames, industry must rely on a regular administrative process with an end in sight to ensure sufficient time to design, fund, construct, and install the controls necessary to meet these requirements. Moreover, these standards require substantial investment by regulated entities. EPA estimated that annual costs in 2000 to meet the requirements of Section 112, as amended in 1990, were $780 million (1990$) ($840 million by 2010). EPA, *The Benefits and Costs of the Clean Air Act*, EPA 410-R-99-001, at 25-26 (1999), *available at* http://www.epa.gov/oar/sect812/prospective1.html.

When issuing subsequent source-specific standards, EPA made a determination whether the general provisions promulgated in 1994 were applicable to that source category. 59 Fed. Reg. 12,408, 12,408/3-12,409/1, 12,412/1 (Mar. 16, 1994). Based on the 1994 regulations, the SSM provision

was considered a default requirement that was applicable. If EPA believed that the standard for steady-state operations could be applied during SSM events, in whole or in part, for a particular source category, EPA proposed specific SSM provisions for that source category. *See, e.g.*, 40 C.F.R. §§63.342(b)(1) (Subpart N - Chromium Electroplating and Chromium Anodizing Tanks), 63.5320(a) (Subpart TTTT - Leather Finishing Operations).

EPA has determined that standards for 35 source categories are "immediately affected" by the D.C. Circuit's decision. *See* Letter to Counsel from Adam M. Kushner, Director, Office of Civil Enforcement, at 2, Table 1 (July 22, 2009) ("Kushner Letter"), *available at* http://www.epa.gov/compliance/civil/caa/ssm-memo080409.pdf.[3] Ten of these standards were promulgated at least ten years prior to the D.C. Circuit's decision, including gasoline distribution, pulp and paper, halogenated solvent cleaners, secondary lead smelting, marine loading operations, aerospace manufacturing, shipbuilding and ship repair, printing and publishing, primary aluminum, and flexible polyurethane foam production. Twenty-two of these standards are at least five years old,

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[3] EPA also identified an additional 74 standards, which include specific SSM provisions "that exempts or excuses compliance during SSM events" and is "in addition to, or in lieu of, a cross-reference to 40 C.F.R. §§63.6(f)(1) and (h)(1)." Kushner Letter at 2, Table 2. Even in these cases, the general acceptance of the policy behind the SSM decision made these provisions, for the most part, uncontroversial (and unchallenged by Sierra Club). Yet, they are all now called into question by the D.C. Circuit's decision.

including, in addition to those noted above: combustion sources at pulp mills, steel pickling, Portland Cement, wool fiberglass, secondary aluminum, primary lead, publicly owned treatment works, ferroalloy production, municipal solid waste landfills, paper and other web coating, metal furniture, and boat manufacturing. These standards, and their promulgation dates, are listed below.[4]

Source Category	Subpart	Issue Date	Fed. Reg.
Halogenated Solvent Cleaners	T	12/2/94	59 Fed. Reg. 61801
Gasoline Distribution (Stage 1)	R	12/14/94	59 Fed. Reg. 64303
Secondary Lead Smelters	X	6/23/95	60 Fed. Reg. 32587
Aerospace Manufacturing	GG	9/1/95	60 Fed. Reg. 45948
Marine Vessel Loading Operations	Y	9/19/95	60 Fed. Reg. 48388
Shipbuilding & Ship Repair (surface coating)	II	12/15/95	60 Fed. Reg. 64330

[4] *See generally* EPA, *National Emission Standards for Hazardous Air Pollutants (NESHAP)*, *available at* http://www.epa.gov/ttn/atw/mactfnlalph.html (last updated Sept. 2, 2009).

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Source Category	Subpart	Issue Date	Fed. Reg.
Printing and Publishing (surface coating)	KK	5/30/96	61 Fed. Reg. 27132
Primary Aluminum	LL	10/7/97	62 Fed. Reg. 52384
Pulp and Paper (non-combustion)	S	4/15/98	63 Fed. Reg. 18504
Flexible Polyurethane Foam Production	III	10/7/98	63 Fed. Reg. 53980
Ferroalloys Production	XXX	5/20/99	64 Fed. Reg. 27450
Primary Lead Smelting	TTT	6/4/99	64 Fed. Reg. 30194
Portland Cement Manufacturing	LLL	6/14/99	64 Fed. Reg. 31898
Wool Fiberglass Manufacturing	NNN	6/14/99	64 Fed. Reg. 31695
Steel Pickling	CCC	6/22/99	64 Fed. Reg. 33202
Publicly Owned Treatment Works	VVV	10/26/99	64 Fed. Reg. 57572
Secondary Aluminum	RRR	3/23/00	65 Fed. Reg. 15689

Source Category	Subpart	Issue Date	Fed. Reg.
Pulp and Paper (combustion)	MM	1/12/01	66 Fed. Reg. 3180
Boat Manufacturing	VVVV	8/22/01	66 Fed. Reg. 44217
Paper and Other Web (surface coating)	JJJJ	12/4/02	67 Fed. Reg. 72329
Municipal Solid Waste Landfills	AAAA	1/16/03	68 Fed. Reg. 2227
Metal Furniture (surface coating)	RRRR	5/23/03	68 Fed. Reg. 28605
Primary Copper Smelting (area sources)	EEEEEE	1/23/07	72 Fed. Reg. 2930
Secondary Copper Smelting (area sources)	FFFFFF	1/23/07	72 Fed. Reg. 2930
Primary Nonferrous Metals (area sources)	GGGGGG	1/23/07	72 Fed. Reg. 2930
Acrylic/ Modacrylic Fiber (area sources)	LLLLLL	7/16/07	72 Fed. Reg. 38864

Source Category	Subpart	Issue Date	Fed. Reg.
Chromium Compounds (area sources)	NNNNNN	7/16/07	72 Fed. Reg. 38864
Flexible Polyurethane Foam Production and Fabrication (area sources)	OOOOOO	7/16/07	72 Fed. Reg. 38864
Lead Acid Battery Mfg.(area sources)	PPPPPP	7/16/07	72 Fed. Reg. 38864
Clay Ceramics Manufacturing (area sources)	RRRRRR	12/26/07	72 Fed. Reg. 73180
Secondary Nonferrous Metals (area sources)	TTTTTT	12/26/07	72 Fed. Reg. 73180
Electric Arc Furnace Steelmaking Facilities (area sources)	YYYYY	12/28/07	72 Fed. Reg. 74088
Iron and Steel Foundries (area sources)	ZZZZZ	1/2/08	73 Fed. Reg. 225

Source Category	Subpart	Issue Date	Fed. Reg.
Paint Stripping and Miscellaneous Surface Coating Operations (area sources)	HHHHHH	1/9/08	73 Fed. Reg. 1737
Ferroalloys Production (area sources)	YYYYYY	12/23/08	73 Fed. Reg. 78637

Industry has expended substantial sums of money over the years to comply with these Section 112 requirements, which have now been upset by the D.C. Circuit's decision. Some stark examples follow.

- Gasoline Distribution (Subpart R) (59 Fed. Reg. 64,303 (Dec. 14, 1994)): EPA estimated the required capital investment was on the order of $117 million, and estimated annual costs of $16 million. *See* EPA Fact Sheet, *Final Air Toxics Rule for Gasoline Distribution Facilities*, at 4 (Nov. 23, 1994), *available at* http://www.epa.gov/ttn/atw/gasdist/gdifact.pdf.

- Printing and Publishing (Subpart KK) (61 Fed. Reg. 27,132 (May 30, 1996)): Implementation of the regulation was estimated to cost $40 million annually (including capital recovery over a ten-year period). 61 Fed. Reg. at 27,135.

- Pulp, Paper, and Paperboard (Subpart S) (63 Fed. Reg. 18,504 (Apr. 15, 1998)): EPA estimated that industry would expend $496 million in capital costs for this standard, and $125 million in annual costs. 63 Fed. Reg. at 18,582.

- Marine Tank Vessel Loading Operations (Subpart Y) (60 Fed. Reg. 48,388 (Sept. 19, 1995))[5]: EPA estimated capital costs expected to result from the regulations of approximately $266 million to $440 million, and annual costs of $60 million to $100 million. 60 Fed. Reg. at 48,390.

- Primary Aluminum (Subpart LL) (62 Fed. Reg. 52,384 (Oct. 7, 1997)): EPA estimated the total capital costs of $160 million, with a total annualized cost of $40 million. 62 Fed. Reg. at 52,391. Industry asserted these costs were substantially higher. *Id.* at 52,396.

- Flexible Polyurethane Foam Production (Subpart III) (63 Fed. Reg. 53,980 (Oct. 7, 1998)): EPA estimated the total capital costs of $74 million, with a total annualized cost of $8.1 million. 63 Fed. Reg. at 53,988.

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[5] EPA provided a staggered compliance schedule for certain control requirements under this standard, but the final rule included an automatic extension for these sources based on comments that more time would be needed due to a limited number of experienced contractors available and potential permitting delays. 60 Fed. Reg. at 48,392-48,393.

- Paper and Other Web Coating (Subpart JJJJ) (67 Fed. Reg. 72,329 (Dec. 4, 2002)): EPA estimated the total capital costs of $222 million. 67 Fed. Reg. at 72,338. Estimated total annualized costs were $69 million. *Id.*

With the D.C. Circuit's overturning of these standards, which have been in place for years and with which industry has long complied, industry must now scramble to ensure their facilities are not in violation of the newly applicable standards developed for steady-state operations. This may require additional controls, new work practices, and a myriad of actions, which require time to plan and raise capital. All the while, facilities may face enforcement risk because, as noted above, when the SSM general provisions were incorporated into subsequent standards SSM was not at issue during development of virtually all of those rules.

Also, EPA is now applying the D.C. Circuit's ruling in this case to other industries outside Section 112, without notice and comment. For example, despite the fact that EPA failed to provide any notice of its action in the proposed rule, EPA has determined that the D.C. Circuit's ruling applies to waste incinerators regulated under Section 129 of the Clean Air Act. 74 Fed. Reg. 51,368, 51,375 (Oct. 6, 2009). Without seeking any data or comment, EPA simply removed an exemption for SSM that had been in place since 1997 for hospital, medical and infectious waste incinerators.

II. By Reopening the Section 112 Standards Without First Requiring Petitioners to Seek Relief from EPA, the D.C. Circuit has Required Industry to Comply with Standards During SSM Periods Without an Opportunity to be Heard on Whether Compliance is Feasible.

Section 112(d)(2) provides that standards for hazardous air pollutants must require the maximum reduction of emissions that EPA, "taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impacts and energy requirements, determines is achievable . . .." 42 U.S.C. §7412(d)(2). Section 112(d)(3) provides that the maximum reduction that is "deemed achievable" for new sources shall not be less stringent that the emission control "achieved in practice by the best controlled similar source." *Id.* For existing sources, the emission control deemed achievable shall not be less stringent than "the average emission limitation achieved by the best performing 12 percent of the existing sources." *Id.* at §7412(d)(3).

In the Section 112 emission standards containing SSM exemptions, EPA did not make a finding that compliance with otherwise applicable limits during SSM events was "achievable," nor that such compliance had in fact been "achieved in practice" by the best controlled similar source or best performing 12 percent of existing sources. That is so because the SSM exemptions relieved industry from compliance with regular emission standards during such SSM events.

Indeed, the basic premise of the SSM exemptions was that compliance was *not* "achievable" during SSM events. In proposing the SSM provision in 1993, EPA recognized that special situations may occur "such as unpredicted and reasonably unavoidable failures of air pollution control systems, *when it is technically impossible to properly operate these systems.*" 58 Fed. Reg. 42,760, 42,777/3 (Aug. 11, 1993) (emphasis added). For example, in the hazardous pollutant standard for arsenic, EPA found process upsets and equipment malfunctions can result in increased emissions. 51 Fed. Reg. 27,956, 27,973 (Aug. 4, 1986) ("These monitoring data [from the ASARCO-Tacoma smelter] have shown that arsenic concentrations dramatically increased when increased fugitive emissions were released during upsets of the copper converters and when malfunctions of control equipment resulted in an increase in emissions."). While EPA has found that many malfunctions could be addressed by taking reasonable measures, EPA also recognized that malfunctions can result from actions out of the facility's control, such as: unexpected failure of monitoring system components (for example, monitoring equipment, data acquisition equipment); catastrophic events (for example, fire, lightening, extreme weather/storms, flood, earthquake, meteors, and other acts of God); loss of utilities (for example, power, gas, water, as applicable to equipment); and sudden and unavoidable failure of control or process equipment, not due to poor operation or maintenance. *See* EPA, *Secondary Aluminum NESHAP 40 CFR Part 63 Subpart RRR: Example Malfunction Plan for Plant ABC*, at 7 (Apr. 3, 2003),

available at http://www.epa.gov/ttn/atw/alum2nd/malfunctionplanver-6.pdf.[6]

When the D.C. Circuit in this case reopened and invalidated the SSM exemption, the achievability of otherwise applicable emission standards during SSM periods became relevant for the first time. And yet, because petitioners had not first filed a petition with EPA to request reopening, industry is now being required to comply during SSM periods without ever having had the opportunity to submit evidence to the agency concerning achievability, and without EPA ever having made the achievability finding the statute requires. In short, the D.C. Circuit's belated reopening of these standards, without first requiring an agency petition, has not only upset long-settled expectations, but has also resulted in a process denying the regulated industry the basic procedural rights guaranteed by the Clean Air Act.

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[6] EPA's recognition of the difficulty of achieving standards during SSM periods has been supported by the courts, which have long held that EPA must account for malfunctions in developing technology-based standards, such as those under the Clean Water Act. *Marathon Oil Co. v. EPA*, 564 F.2d 1253, 1257, 1272-73 (9th Cir. 1977) (finding "upset provision" was necessary for Clean Water Act discharge limit based on what is "achievable" because exceedances occur that are "beyond the control of the permit holder" and because it is "impossible and impracticable to set a standard that could be met 100 percent of the time"); *FMC Corp. v. Train*, 539 F.2d 973, 986 (4th Cir. 1976) ("Plant owners should not be subject to sanctions when they are operating a proper treatment facility. Such excursions are provided for by the ambient air standards established under the Clean Air Act, 40 C.F.R. ss 50.4-50.10, and this Court sees no reason why appropriate excursion provisions should not be incorporated in these water pollution regulations.").

And it is far from clear that such compliance is, in fact, achievable. Startup and shutdown of units, for example, may require different emission standards, simply because the equipment operates differently during those times. It may take time for units to heat up and cool down before reaching the optimum operational efficiency. It also may be difficult to measure emissions during these periods, because emissions are below the detection limit or the control system takes time to become fully operational. That is why EPA exempted such periods from the emission limits applicable during periods of steady-state operation, and instead applied a duty to minimize emissions.

If the D.C. Circuit had required Sierra Club to follow the regular order of the administrative process and file a petition for rulemaking, it would have had a record before it showing, for example, that in many cases during periods of malfunction, bypassing emission controls may be required to avoid an explosion or serious harm to the public or workers. "For some combustion units, malfunctions are by their nature unsafe conditions which can lead to excessive combustible mixtures in a furnace that can result in explosions, equipment damage and personnel hazards." Comments of the Council of Industrial Boiler Owners on NESHAP from the Portland Cement Manuf. Indus., Proposed Rule, at 10 (Sept. 4, 2009) (EPA-HQ-OAR–2002–0051-2846.1), *available at* www.regulations.gov. EPA also has recognized that power failures at municipal landfills may require flaring for safe operation. EPA, *How to Prepare a Startup, Shutdown, Malfunction Plan for Collection and Control Systems at Municipal Solid Waste Landfills*, EPA-456/R-03-006,

at A-3 to A-5 (Dec. 2003), *available at* http://www.epa.gov/ttn/atw/landfill/lfssm12_03.pdf.

Other cases have been reported of power failures that have required facilities to use a flare system to bring units to a safe operating state. *See, e.g.*, Larry Altman, *Wilmington refinery suffers blackout*, dailybreeze.com, Mar. 11, 2009, http://www.dailybreeze.com/ci_11893024; Matt Scalian, *Power outage causes flaring at Norco plant*, New Orleans Metro Real-Time News, Oct. 23, 2008, http://www.nola.com/news/index.ssf/2008/10/power_outage_causes_flaring_at.html. These power failures are more often outside the control of the facility, and the operator must make a fast decision how to address such malfunctions to ensure the safety and well-being of the workers and the public. The D.C. Circuit's decision places these operators in an untenable position of potentially violating the Clean Air Act or potentially causing serious injuries to workers and the public.

The potential for such events was the impetus of the SSM provision now vacated by the D.C. Circuit. EPA made a legitimate policy decision with respect to standards issued under Section 112, and the Sierra Club should have been required to petition EPA to reassess this policy, not circumvent the strict time limits imposed by Congress for review. This Court, therefore, should grant the petition for a writ of certiorari to bring back order to the administrative process, which has been undermined by the D.C. Circuit's decision.

CONCLUSION

The petition for a writ of certiorari should be granted.

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